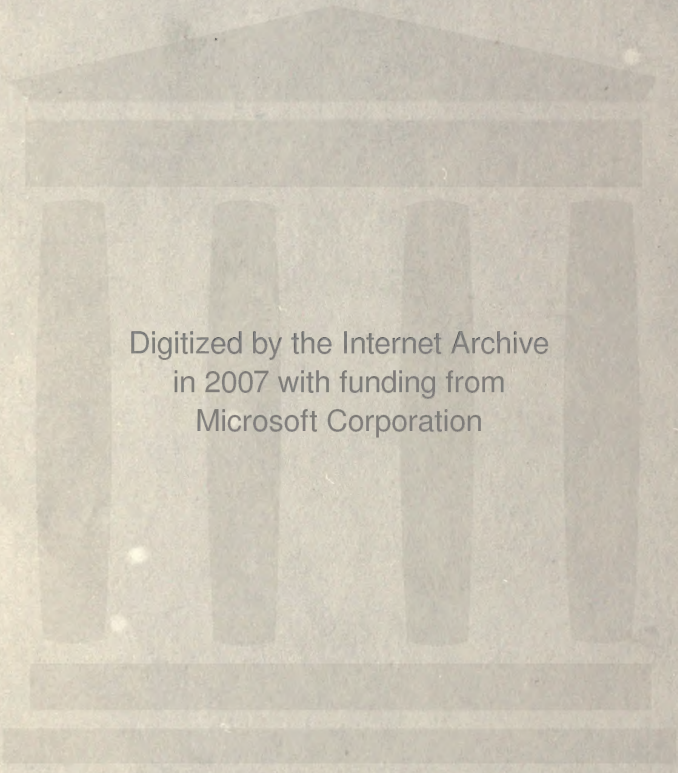
NORMAN G. BARRIER



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CONFIDENTIAL.

NOTES AND MINUTES BY SIR SYED ALI IMAM, K.C.S.I., C.S.I.

No. 1.

STATUTORY POWERS OF THE SECRETARY OF STATE RELATING TO THE GOVERNMENT OF INDIA OR ITS REVENUES.

(22nd December 1910.)

Public Works Department Civil Works Miscellaneous Proceedings, A., March 1911, Nos. 1—9.
(Legislative Department unofficial No. 565 of 1910.)

The Secretary of State's power as covered by the statutes, cannot be denied regarding the superintendence, direction and control of matters relating to the Government of India or its revenues. Strictly construing the statutory provisions, it will have to be admitted that the Secretary of State has not in the case under consideration exceeded his authority. The ground of usage or practice stands on a different footing. Considering the relation of the Government of India to the Secretary of State it will not be perhaps out of place to draw his attention to what has been recognised, if that be so, as the accepted rule of conduct of such matters in the past. The despatch of the Secretary of State, however, does not, to my mind, raise the question which seems to exercise the Public Works Department. It seems to seek information and not claim a right.

No. 2.

POWERS OF THE COURT OF WARDS.

(26th February 1911.)

Legislative Department A., Proceedings, May 1911, Nos. 16—20.

I AGREE with the Deputy Secretary[1] in the view that the expenses of litigation in defending a ward up to the Court of first instance should be a charge on the estate. As the law stands at present, the Court of Wards has no protection against a successful claimant executing his decree for costs and mesne-profits. The money spent by the Court of Wards in defending the ward is not treated as valid expenditure and the claimant is entitled to realise it from the Court of Wards. There is a ruling of the Calcutta High Court that goes further. It leaves the claimant free to execute the decree against an officer of the Court of Wards personally holding him liable for the same. As the Government cannot abandon its officers, the liability has to be met with by the Government. It is obvious therefore that Government has at present to run much risk in exercising its powers under the Court of Wards Act. The provisions of that Act are wholesome and go a long way to save the estates of minors and disqualified proprietors from falling into the hands of unscrupulous persons. On grounds of public policy it will be highly undesirable to allow this element of risk to remain as it is calculated largely to take away from the utility of the Court of Wards Act.

The position of the Court of Wards after a competent Court has found against the ward is a very different one. Here there is a judicial pronouncemont in favour of the claimant and the presumption till the decision is set aside is all on his side. I should therefore think that in most cases the Court of Wards will be best advised to consider its responsibility to the estate and the claimant before it ventures to prefer an appeal. Much will of course depend on the opinion of the law officers of the Crown. It is to be presumed that they will advise to appeal only in cases where they think the decision of the Court of first instance is manifestly wrong. In such cases the Government should, I think, pledge its own money as security to carry the litigation into the Court of appeal. If this is not done, I am of opinion that the balance of disadvantage to a claimant in obtaining redress in our Courts will be enormous. I therefore agree with the Deputy Secretary[1] in the view that the cost of litigation in appeal against the order of the Court of first instance should not be a charge on the estate in the event of the appeal failing.

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[1] Mr. A. P. Muddiman.

No. 3 (I—II).

THE MUSSALMAN *WAKF* VALIDATING BILL.

I.

(2nd March 1911.)

I AM of opinion that sanction should be given to introduce the Bill. Muhammadan feeling is very strong on the subject. The Privy Council ruling is known to have taken an erroneous view of the Muhammadan Law of *Wakfs*. To ask the Muhammadan to go again to the Judicial Committee of the Privy Council to enunciate the correct law this time is to hope against hope. That Committee prides itself on never having reversed its decision. I venture to think Muhammadan non-official members of the Legislative Council will support Mr. Jinnah[1] to a man. I have grave apprehension that withholding sanction to introduce the Bill will cause much dissatisfaction among the Muhammadans.

Legislative Department A., Proceedings, April 1913, Nos. 305—351.

II.

(24th November 1911.)

THERE is a large consensus of Mussalman opinion in favour of the principle of this Bill. The Muhammadan law is sufficiently clear and explicit so far as the validity of a *Wakf* in favour of one's own family and descendents is concerned. To make such a provision may not be treated as a pious and charitable act according to modern ideas, but all the recognised Muhammadan jurists are agreed in looking upon it as an act that has merit in the eyes of God. I am clearly of opinion that their Lordships of the Privy Council have wholly failed to appreciate the principles of Islamic jurisprudence underlying the creation of *Wakf-alal-aulad*. These principles may be repugnant to the critical sense of the modern lawyer as he may hold them to be an encouragement to the creation of perpetuities, but if we have to allow the Muhammadans in this country the enjoyment of their personal law it will only be a bare act of justice to liberate them from the restraints imposed by the decisions of the Privy Council.

With regard to the validity of a *Wakf* in favour of oneself the Hanafi school of Muhammadan law is as much beyond question as it is in the case of such an endowment in favour of one's family and descendants. It seems to me that the Hon'ble Mr. Jinnah[1] has acted with a true lawyer's foresight in giving this Hanafi principle a place in this Bill.

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[1] Member of the Legislative Council of the Governor General.

The main principle of the Bill is based on a correct interpretation of the Muhammadan law and I have no hesitation in giving it my full support. Even if it be conceded that the proposed legislation will adversely affect the value of properties held by Indian Muhammadans I do not quite see how we can refuse to give our consent when they have made out a good case both on the correct enunciation of their law and the genuine earnestness of an almost universal demand on their part to give effect to it. I am not by any means sure that this legislation will exercise such a baneful influence on property owned by them as is expressed in some of the opinions we have received. The law of *Wakf* is but a branch of the Muhammadan law and has to be examined in its relation to the other branches of that law. For a scientifically precise and accurate treatment the whole system of the law of the Muhammadan must be considered together. Their law of inheritance, gifts, dower, and testamentary disposition cannot be disregarded in this connection. Taking the law of the Muhammadans as a whole I am of opinion that their property will not suffer from depreciation in any appreciable degree if this Bill is passed.

I am unable to give my support to those parts of the Bill that deal with the execution and registration of a *Wakfnama*. The procedure embodied in these parts of the Bill is not only cumbrous and superfluous but a serious encroachment upon the Muhammadan law. Probably considerations arising out of the question of the protection of creditors are responsible for these provisions in the Bill. The general law of the land sufficiently protects creditors in cases of alienation by an ordinary *Wakf*. I agree with Secretary[1] that the protection afforded by the existing law is sufficient to cover the case of such a *Wakf* as may be created under the Bill. Under the circumstances I am disposed to think that all that is needed is to reverse the effect of the Privy Council rulings by an Act declaring the validity of a *Wakf* in favour of the *Wakif's* family and in cases of Hanafis of the *Wakif* himself.

[1] Sir William Vincent.

No. 4.

DELEGATION BY THE GOVERNOR GENERAL IN COUNCIL OF HIS EXECUTIVE POWERS AND DUTIES IN CERTAIN CASES.

(17th July 1911.)

I AGREE with Secretary[1] in the observation that the proposed legislation has reached that stage when the plain duty of the Legislative Department is to carry out the instructions received from the Home Department and give full effect to them. So far as this goes, the Legislative Department has done its duty.

Legislative Department A., Proceedings, September 1912, Nos. 4—33 A.

2. Except in an important matter of substance, the proposals contained in the draft Bill have been considered by Hon'ble Members in circulation, have received the approval of Lord Minto and have been the subject of a despatch to the Secretary of State who has given the same his sanction. Under the circumstances, I cannot but feel much diffidence in venturing to offer any comments on this case. I can do so only as a Member of the Government of India irrespective of my position in the Legislative Department. My excuse for entering upon a course that may conceivably appear to be unnecessary and uncalled for is a genuine apprehension of the proposed legislation evoking a storm of opposition from the public. Some indication of the virulence of such opposition may be gathered from what has already appeared in the *Hindu* of Madras quoted with approbation by the moderate paper the *Hindu Patriot* of Calcutta in its issue of the 14th of June, 1911, and the *Amrita Bazar Patrika* of the 5th July. The public has not yet seen the Bill and the papers referred to above have taken objection to the very principle of delegation. They do not yet know what a departure the legislation in contemplation aims at. When they do so, they will find that the Bill opens rather a wide door to the delegation of " all or any executive powers or duties conferred or imposed upon " the Governor General in Council or " any authority subordinate to him by any enactment made by any authority in India." They will also find that the said delegation can be made to " any authority or class of authority " specified in a notification in the *Gazette of India*. They will further discover that powers of " a like delegation " are intended to be conferred on such Local Governments as have Legislative Councils or may hereafter have such Councils. True, the Bill provides certain safeguards against the exercise of such powers of delegation. These safeguards, in my opinion, will not take away the blank-cheque character of the legislation, nor, I fear, will they be deemed to be effective by the people. I have very

[1]The late Sir John Macpherson.

great doubt in my mind of the Bill receiving any appreciable support from even the moderates. This is just the kind of opportunity the discontented and the professional agitators want to foment unrest and disaffection. If the Bill is introduced at Simla next September preparatory to its passage in Calcutta in the coming cold weather, I have no doubt in my mind that it will stir up a widespread agitation and vigorous opposition. I should be sorry to see the country in the throes of any such public excitement at or about the time His Majesty the King-Emperor will be in India.

3. Whereas I fully sympathise with the Home Department in the desire to secure administrative facilities that the Bill is designed to create, I cannot overlook the manner in which it could affect the legislatures of the country. Numerous enactments have been passed in which the exercise of power has been subjected to the control of previous sanction of the Governor General in Council or the supreme authority in a Local Government. In most of such instances non-official members have given their consent to the measures on the security of such safeguards. The Bill under consideration sweeps away all these barriers without any discrimination. It seems to me it would be treating the legislatures somewhat cavalierly in bringing about such momentous changes in the manner suggested. I do not consider the proposed "tabling" of draft notifications for the purposes of delegation, or the other measures of safeguard provided for in the Bill, as any answer to the objection arising out of the question of undue interference with the legislatures. On the contrary, I think each attempt at delegation, unless of course of very minor and unimportant a character, will lead to lively and heated debates in Council and agitation in the press and on the platform. If it is not intended to apply the provisions of this Bill to delegation of material and important powers, I cannot understand what is gained in framing the provisions of the Bill in highly unrestricted terms. If, on the other hand, we do not know and cannot give the details of the powers that we may have to delegate, it seems to me that to present the Bill in Council is to ask the non-official members to take us on trust. One must have too sanguine a disposition to expect them to do so. I venture to observe that our inability to give any adequate idea of the extent to which we intend to use the power we want, considerably reduces our claim to the grant of such powers. I must confess I find considerable force in the earlier notes of the Home Department in this case when a general Act of delegation was deprecated and preference was given to proposals to pass Acts of decentralization. A general Act of delegation has been disapproved of in the Legislative Department almost throughout.

4. As a matter of technicality, the draft Bill is in excess of the sanction given by the Secretary of State, inasmuch as it proposes to legalize not only delegation of "power" but also of "duty." The Despatch to the Secretary of State, No. 20 of the 6th October

1910, referred only to " powers " and not " duty." The difference between the permissive character of the function of the one and the mandatory character of the other is sufficiently pronounced to warrant a reconsideration of the Bill from this standpoint. Another matter of technical irregularity in respect of this Bill arises out of Rule 19 of the Rules of Executive Business not having been complied with in so far that the proposed legislation was neither discussed in Council nor was such discussion dispensed with by His Excellency the Viceroy.

No. 5. (I-II.)

THE BOMBAY RACE-COURSES LICENSING BILL.

I.

(7th October 1911.)

Legislative Department A., Proceedings, February 1912, Nos. 1—36.

THE argument put forward in the notes of this Department touching the necessity of a definite sanction or rejection by the Government of India of a Bill that contains penal clauses is difficult to meet. The despatch (No. 35 of 1862) of the Secretary of State referred to and Rule 29 of Executive Business are explicit in their meaning. It seems to me that they clearly impose an obligation on the Government of India from which it cannot free itself nor can it be urged that it is desirable that it should do so. Centralization of authority sanctioning the introduction of new penal provisions in the existing criminal law of the country is a necessary safeguard both for the protection of the liberty of the subject as well as that uniformity of criminal liability which, as far as is possible, should be secured for the whole of British India. Under the circumstances it is, I venture to think, necessary that a definite attitude should be taken by the Government of India with regard to this Bill. It must either accord its sanction to the proposed introduction or withhold it. A position of neutrality that shirks responsibility is to my mind untenable as much on the ground of constitutional obligation as on that of public policy.

2. As regards the view taken by Secretary[1] relating to the exercise of the ultimate power of the Governor General to refuse assent to the Bill after it is passed, I am unable to agree with him. It is suggested that it will be inconvenient to finally withhold assent after permission to introduce the Bill has been given. I fully appreciate the inconsistency that such a course would seem to suggest but it is worthy of consideration that the two stages of sanction stand on two different footings. By according sanction to introduce a Bill the Government of India's position is no better or worse than giving permission for its consideration by the legislative assembly concerned. The sanction of the Governor General to the introduction of certain classes of Bills is necessary under Section 19 of the Indian Councils Act, 1861. Non-official Members ask for and receive sanction to do so. It cannot for a moment be conceded that because the sanction to introduce has been given it carries with it the official approval of the provisions of the Bill to the introduction of which such sanction has been given. The preliminary sanctions are intended to give no more than an opportunity for the proposals to be submitted to the test of legislation. The expansion of the Legislative

[1] Sir William Vincent.

Councils and the introduction of a large measure of the election element in them have created changes that affect the consideration of this question. Should such a Bill as has received sanction from the Government of India to its introduction be passed in a Provincial Council by a slender majority made up mostly of official and nominated members as against a solid opposition by the elected members, a valid and substantial ground based on considerations of high policy may be found to justify the withholding of ultimate assent. Many other considerations may arise clearing the passage of the Bill through Council to introduce the adoption of this course. I therefore think that the Government of India need not necessarily be influenced in its present decision by the reflection that its future action will in any way be seriously fettered.

3. Before I proceed with my remarks on the provisions of this Bill I wish to express my deep sympathy with the Government of Bombay. His Excellency the Governor is heroically trying to suppress an evil that is widespread in that Presidency and has taken hold of society in a manner that has spelled ruin to many and, unless controlled, is likely to prove disastrous to many more. The administrative expediency of establishing some effective control is a policy to which I am prepared to give my full support; at the same time it is not possible for me to overlook the defects that are patent in the Bill.

4. Though I believe the evil the Bill is intended to eradicate is acute in Bombay, I have some apprehension that the moment a check is put upon it in that Presidency, it will spread out to other parts of India. Very likely Calcutta, when the ground is well prepared for its reception, will be the first victim. There are probably other places in India that may be equally unfortunate. It is a matter for consideration therefore whether a general Act should not be passed for the whole of India. I agree with Secretary[1] in the view that it is desirable to adhere to uniformity and avoid the anomaly of holding the one and the same conduct criminal in one part of India and not in another.

5. I am in entire agreement with Secretary[1] in that the Bill goes far beyond what seems to have been originally intended. To limit the number of race meetings and prohibit betting with bookmakers would seem to be a fairly good ground for legislation. The Bill as framed is, however, too drastic and seems to cover all kinds of betting and wagering whether connected with racing or not. If all wagering is made a penal offence, as the provisions of this Bill no doubt do, the cure will be perhaps worse than the disease. However much it may be desirable from the point of view of the moralist to purge society of the evils of wagering in whatever form, we cannot disregard the fact that to do this with legislation has not yet been successfully attempted in any part of the civilized world. The Bill

[1] Sir William Vincent

defines "place," "totalization," "instrument of gaming" and "common gaming house" in such general and unrestricted terms that even the most harmless form of betting and wagering wholly dissociated with racing will be held to be criminal. I think it will be unwise to spread the net too wide as it may be its own undoing in the end by alienating the sympathy of those that are willing to give their support to a moderate measure.

6. I am not prepared to raise any objections based on the ground of immorality attaching to the licensing of totalizators. If the general immorality of reckless betting can be lessened by the issue of these licences I would not condemn it as it will subserve a moral and not an immoral purpose.

II.

(21st October, 1911.)

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I am entirely unable to accept the statement of the Hon'ble Home Member[1] that the only material change in the Bill is in the definition of the word "place," though that is of course a most material change. In dealing with the definition of "common gaming house" my Hon'ble Colleague omits to notice the importance of the substitution of the word "place" for the words "house, room or place" in that definition. The change is of the greatest importance as the words "house, room or place" have received frequent judicial interpretation in accordance with what is known as the *ejusdem generis* rule, and it is this omission that changes the whole scope of the Act. A "common gaming house" under the Act is, in my opinion, a house, office, room or similar place appropriated by the owner or the occupier to the special purpose of gaming. Such has been the interpretation of the definition of a "common gaming house" by the highest Court of Appeal in England. The same interpretation of the law has been consistently followed in India as evidenced by the fact that attempts to prosecute men for gambling in private houses, in boats, railway trains, *thakurbaris* and in the godowns of mercantile establishments have always been unsuccessful. To nullify the effect of the various rulings of the Courts in England and in India, not only have the words "house, room or place" been omitted in the Bill, but a new definition has been given to the substituted word "place." These alterations are important and far-reaching in their effect inasmuch as they eliminate the limitations imposed by the words "house, room" or similar places dedicated to gaming and include any place anywhere in the world. It will be observed that one of the principles of the Act is the restriction on the meaning of the word "place" in the definition of "common gaming house." The Bill abandons that principle.

There is a further change of importance. The Act in the definition of "common gaming house" contains the words "own-

[1]The late Sir J. L. Jenkins.

ing, occupying, using or keeping." This language has been taken from English statutes. The word " using " has been the subject of repeated judicial interpretation, and it has been held in the context that it means " use in the way that a room or an office may be used " including only some peculiar and exclusive right of user such as might be exercised in regard to such office or room. It has also been held that in the context it did not include a user in common with mankind in general. In a Bombay case a number of visitors were accused of gambling in a *jamatk ana*. It was found that they were making use of the *jamat khana* in a sense but that they could not be convicted under Section 4 of the Act, as the use contemplated by that section was not a casual one. To avoid these rulings the word " keeping " has been eliminated from the Bill and the word " using " is altered into " making use of." Taken with the new definition of the word " place," which is not subject to any restriction whatsoever, an entirely new construction is put upon the character of the user. It is freed from the limitations imposed by the rule of *ejusdem generis*. The drafter of the Bill was aware of the inconvenience of the word " using " read with the words " owning and occupying." He has therefore deliberately introduced the words " making use of " to denote a temporary and casual user. The result is that the definition of the term " common gaming house " has been largely extended and will apply to anyone who, even casually, makes use of any place for the purpose indicated in that definition. This is a substantial change of principle.

In the definition of the term " gaming house " there is yet another departure from the principle of the Act which I have to notice. The substitution of the words " any instrument " for " cards, dice, tables or other instruments " completely gets rid of the judicial interpretation that so far the term " instruments of gaming " has received when read with the words " cards, dice, and tables." In the new definition of the term " common gaming house " no room is left for the construction that the instrument of gaming must be of the same kind as cards, dice, etc. Under the definition as it stands in the Act a coin is excluded from the category of instruments of gaming, but this construction is not possible under the definition of " common gaming house " given in the Bill. It is noticeable that section 12 of the Act which relates to gaming in public streets has not been interfered with and the words " other instruments of gaming " are left to retain the restricted character given to them by judicial pronouncements. On the other hand, sections 5 and 7 of the Act which relate to offences or matters connected with a common gaming house, have been altered by the deletion of the words of restriction like cards, dice, etc. It is obvious that these changes in the definition of a " common gaming house " and in the connected sections 5 and 7 of the Act have a purpose. The expression " instruments of gaming " has been defined in section 3 (*b*) of the Bill and includes " any article used as a subject or means of gaming." This definition is wide enough to

cover any article in the world that has been used either as a subject or means of gaming. The Bill by the changes it purports to introduce in this connection in the definition of a " common gaming house " and sections 5 and 7 of the Act has given a new meaning to the term " instruments of gaming."

The changes and alterations that I have pointed out are revolutionary, involving fundamental changes of the principles of the law relating to gaming. Under the Bill any position answering to the following conditions will constitute a " common gaming house "—

(1) Any place anywhere in the world.

(2) Any article used as a subject or means of gaming in or at that place.

(3) Such article used for the profit or gain of the person making use of the place casually.

(4) The profit or gain accruing even howsoever otherwise than by a charge for the use of the article or of the place.

I may mention here that there is no distinction between a professional betting man and any other person in so far as the legal interpretation of " profit or gain " is concerned. In this view I am supported by the judicial pronouncements of the highest Court of Appeal in England. The result is that a " common gaming house " as defined in the Bill includes any place in or at which coin for example used as a subject or means of wagering is used for the profit or gain, in whatsoever way, of the person making use of the place.

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I have expressed my entire sympathy with the proposal to control betting on horse racing. Would it not therefore be advisable to take a straightforward course and by simple and direct legislation control the evil? The Bill makes no distinction between racing and other kinds of wagering. It leaves all wagering in the same category with betting on horse racing. The mischief obviously arises from the attempt to graft clauses from an Australian Bill dealing with racing on an Act which was not originally framed to touch racing at all. Surely legislation can be undertaken to prohibit racing except on a licensed race-course, the issue of such licences being controlled by the Local Government who should have power to limit the number of race meetings and the manner in which they are conducted.

No. 6. (I—IV).

INDIAN COMPANIES BILL.

I.

(1st December, 1911.)

Legislative Department A., Proceedings, April 1913, Nos. 373—445.

THE DRAFT Bill represents a great deal of care and labour which the Deputy Secretary[1] has bestowed on its preparation. All matters of principle and substance have been sufficiently dealt with to justify its despatch to the Secretary of State at an early date. As I noted on 12th July, 1911, the general frame of the Bill has to follow the provisions of the English Act. This, in the main, has been effected as far as it was possible to suit Indian conditions. Any further re-arrangement of form and even of substance that are not *res integra* may be taken up after the Bill has come back from the India Office.

As regards giving effect to current Case Law by explanations, I am d sposed to agree with Deputy Secretary[1] in the views expressed by him in paragraph 2 of his note. The incorporation of such law as is evolved by judicial pronouncements is likely to impart some degree of rigidity which may be undesirable to introduce in the Bill. Judge-made law grows and nothing should be done to check its growth by throwing impediments in the way of the courts that should be left free to construe and interpret an Act.

Clause 9 (*section 7, Companies Act, 1908*).—Restriction on alterations of the Memorandum of a Company seems to be a necessary measure just as much as freedom on the part of the signatories to insert such matters as are not obligatory under the law. I am unable to agree with the suggestions of the Department of Commerce and Industry in this connection, as in the one case they would sanction too much of latitude and in the other impose undue limitations. The amendment proposed involves a departure which affects some of the principles that have been held to underlie the formation and governance of companies and associations. Company Law in India has yet to await developments and it can hardly be desirable to enter upon an innovation of a far-reaching character at its present stage.

Clauses 11, 12 and 13.—This amendment will afford some relief to the trading public and also in some degree lessen the work of the High Courts. The power to deal with matters falling under these clauses may confidently be placed in courts having jurisdiction to wind-up.

Clause 23 (*2*).—I think the curtailment of power suggested by Deputy Secretary[1] is hardly necessary and may be looked upon as unduly severe. I am inclined to favour the retention of the powers provided by section 17 (*7*) of the Companies Act, 1908.

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[1]Mr. A. P. Muddiman.

Clause 142.—I entirely concur with Secretary[1] and Deputy Secretary[2] in the view that the choice of selection of auditors should not be narrowed down as has been suggested by the Department of Commerce and Industry. It will be unwise for Government to take upon itself a responsibility which is hardly warranted, once the civil and criminal liability of an auditor is placed on a sure footing. To place the hall-mark of Government on auditors and to limit the selection from among them only will lead to exorbitant raising of fees and the retarding of healthy competition.

Clause 315.—The penal provisions of this clause have been rightly given prominence by dealing with them definitely in the draft Bill.

II.

(25th September, 1912.)

The proposals put forward by the administrative department concerned do not seem to me to be an attempt at a comprehensive treatment of the subject under reference. The regulation of "Banks and Banking" is a matter full of difficulty and so largely affects the public that any but a thorough examination of its conditions in India is not likely to lead to beneficial results. As has been pointed out by the Secretary, if effect is given to the proposals, they will affect with undue severity many banks owned and conducted by Indians. In fact it is exceedingly doubtful whether or not they will punish the innocent more than the guilty. Nor does it appear quite clear how it will be possible to prevent the complete evasion of some of these proposals by a swindler be he a pleader or a prelate. I have very grave doubts of the utility of borrowing a few provisions from the Canadian Act or any other enactment and grafting them on the Companies Bill. There may be perhaps nothing wrong in principle in doing so, but it can hardly be regarded as a panacea for the evils pointed out in Mr. Enthoven's note. I sympathise with his desire to regulate and purify "Banks and Banking" in this country, but venture to point out that the subject deserves to be treated as a separate question by itself rather than a side issue, arising out of a discussion over the Companies Bill. I admit that much weight is to be attached to the view of Chambers of Commerce, but a vast number of banking firms in the country, European and Indian alike, appear to me entitled to a hearing before Government commits itself to any proposals for legislation. I may mention that the Indian commercial community might also be invited to express its views. In fact the subject appears to me to be too big to be relegated to a few sections of the

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[1] Sir William Vincent.
[2] Mr. A. P. Muddiman.

Companies Bill, and is in every way deserving of being considered by itself in the form of a separate Bill. Apart from this, the Companies Bill, as introduced in Council, has no less than 323 sections, and if anything like a serious attempt is made to thoroughly regulate "Banks and Banking," the add tion of a substantial proportion of the Canadian Act comprising 158 sections can hardly be avoided. The addition of so many more sections to the Companies Bill can scarcely be welcomed as a convenient arrangement. Moreover, the persistency with which the public has been demanding legislation to reform Company law makes it exceedingly inexpedient to hold up the Bill for an indefinite period of time, solely because out of the discussions on that Bill the subject of the present reference has arisen. I doubt very much if the clamouring public will appreciate the ethics of blocking up urgent legislation for the consideration of a question which at best cannot be held to be more than a side issue.

III.

(20th January, 1913.)

As to "private companies," the suggestion to place its essential features in the memorandum instead of the articles seems to be quite sound as obviously the English law did not go beyond the imposition of restrictions in the articles with the result that the law broke down when it came to the question of the observance of those restrictions. On the other hand if the restrictions are embodied in the memorandum they have a place and are a condition in the very constitution of the company. They would thus be inviolable unless of course the company is converted from a private one into a public one. The provision as to the Registrar certifying to the private character of the company will also be useful and among other advantages will secure the proper submission of returns.

The question of the "jurisdiction of courts" is an important one, but I agree with Sir William Vincent[1] in the view that Local Governments should be empowered to vest District Courts with the necessary jurisdiction wherever it may be considered desirable to do so. With the increasing efficiency of District Courts and the growing necessity to bring the authority of properly constituted courts within the easy reach of the commercial public, this provision will secure a measure of elasticity that is likely to serve a useful purpose.

As regards appeals against an order under section 12 I am very doubtful if such a provision will be at all a blessing, as the position of the company pending the hearing of the appeal which may take some time to be disposed of will remain chaotic to the detriment of all concerned. Moreover, in most cases the High

[1] Secretary in the Legislative Department.

Courts will exercise original jurisdiction which is some guarantee of the correctness of decision. I also think the issues involved in the disposal of a case under section 12 are not of such gravity as to call for a right of appeal.

IV.

(4th January, 1913.)

(1) THE PROVISIONS regarding directors being such as to include persons who are in fact carrying on the functions of directors it will be an improvement to lay it down definitely that every company shall have directors. This can scarcely be regarded as a hardship, as in any case some person or persons must act as such in a company and be held to be directors by implication. The amendment of the Bill on this line is not likely to result in any confusion of the private interests of directors and those of their company, they having defined legal meaning and place in the law of principal and agent. The fiduciary position of directors is a recognised principle adding additional responsibility on the one hand and protection on the other. I also agree with Mr. Muddiman[1] that the law of principal and agent covers the case of such managing agents as are appointed under a contract.

(2) This is unobjectionable from the point of view of this Department.

(3) To pin down the managing agent and prevent him from freely allocating transactions to serve his private ends would be undoubtedly a move in the right direction, and so far as the substance of this proposal goes I am in complete agreement with the Department of Commerce and Industry. The question, however, is whether it is possible to carry it out on the lines suggested. I am not qualified to say what commercial difficulties, if any, will present themselves if the managing agent were to disclose his principal to the person that he contracts with. The disadvantages pointed out by Deputy Secretary[2] appear to be real, but the graver objection arises from the fact that the amendment in the form in which it stands at present touches the Indian Contract Act. This can be avoided if the obligation to report to the directors of his company was imposed on the managing agent. It is for commercial experts to say whether this is practicable and an adequate safeguard, but in any case to mix up an outsider in a matter that concerns the agent and his company only seems to be undesirable.

(4) I am unable at present to express any view on the question of re-circulation, as much depends on what transpires in the Committee stage of the Bill.

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[1] Deputy Secretary in the Legislative Department.
[2] Mr. A. P. Muddiman.

No. 7 (I—III).

POWERS OF THE INDIAN LEGISLATIVE COUNCIL TO PASS RESOLUTIONS AFFECTING THE PROVISIONS OF THE GOVERNMENT OF INDIA ACT, 1833.

(Position of the Indian Legislature.)

I.

(9th January, 1912.)

Legislative Department A., Proceedings, March 1912, Nos. 104—108.

I AGREE with the Secretary[1] that the proposed resolution is barred but I do so on somewhat different grounds from some of those urged by him. The first part of the proposed resolution involves an assumption of power which by Section 39 of the Government of India Act of 1833 is vested in the Governor General in Council. Section 22 of the Indian Councils Act of 1861 has removed from the cognizance of the Governor General's Legislative Council the making of any laws or regulations which will in any way affect the provisions of the Government of India Act of 1833. It is therefore obvious that the acceptance of the proposed resolution will be a breach of Rule 3 (*a*).

2. The second part of the suggested resolution is no less objectionable on the gounds mentioned above. The gist of it is that the Railway Board's action shall be subject to consultation with the proposed Standing Committee not to speak of the discussions in Council prior to the preparation of the Financial Statement. Now the Railway Board is one of the Departments of State through which the Governor General in Council exercises his power of "superintendence, direction and control" conferred on him by Section 39 of the Government of India Act of 1833. To admit this part of the proposed resolution is to subject the provisions of this section to a condition which clearly affects it in a manner prohibited under Section 22 of the Indian Councils Act of 1861. It is therefore obviously barred under Rule 3 (*a*).

3. Secretary[1] has quoted Section 5 (*3*) of the Indian Councils Act of 1909 in support of the exclusion of this resolution. I regret I am unable to accept the application of Section 5 (*3*) in the way relied upon by him. It seems to me that the exclusion must be based on whether or not the giving effect to the proposed resolution will involve such legislation as is barred under Section 22 of the Indian Councils Act, 1861. I have noted above how the resolution in question will entail such consequences. It does not, however, do so in respect of Section 5 (*3*) of the Indian Councils Act of 1909. This section prohibits the alteration or amendment of the rules by the Legislative Council. But should the resolution be passed and

[1] Sir William Vincent

carried, effect can be given to it by the Governor in Council without resorting to any legislation that is barred by Section 22 of the Indian Councils Act of 1861. Secretary's[1] view presents an aspect of the case which is not altogether unarguable, but having given the subject my earnest consideration I find it difficult to agree with the view that Section 5 (*3*) of the Act of 1909 can be successfully quoted to exclude this resolution.

II.

(*22nd February, 1912.*)

I CONSIDER the revised resolution is still open to the objection I took in paragraph 2 of my note of 29th January, 1912. It imposes a procedure which affects the "superintendence, direction and control" conferred on the Governor General in Council by Section 39 of the Government of India Act of 1833 and is, therefore, in my opinion, barred under Rule 3 (*a*).

III.

(*9th March, 1912.*)

THIS reference to Council has originated in a difference of opinion between the Hon'ble Member[2] for Commerce and Industry and myself. It is true the Hon'ble Mr. Vincent[3] has also disagreed with my views, but that alone was not the reason why I mentioned the case at the last Council meeting.

The first part of the Hon'ble Mr. Mudholkar's[4] resolution is intended to subject the programme of railway construction to the criticisms of the Legislative Council before any action can be taken upon it by Government. The second part of the said resolution would subordinate the making of allotments for various railway purposes to the recommendations of a Committee of the Legislative Council composed of equal numbers of officials and non-officials in so far that no allotments could be determined upon till such recommendations were made irrespective of their acceptance or rejection. It seems to me, therefore, that for a time at least the executive authority of the Government of India is sought to be kept in suspension. Should the programme of construction be made in the beginning of April, the first part of the resolution will stand in the way of its being given effect to till there has been a meeting of the Legislative Council which might not be before September. Similarly, the determination of allotments must, under the second part of the resolution, stand over to some such period of time as the Committee of the Council proposed by the Hon'ble Member has considered the heads and has made its recommendations thereon. It

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[1] Sir William Vincent.
[2] Sir William Clark.
[3] Secretary in the Legislative Department.
[4] Then Member of the Imperial Legislative Council.

seems to me that the resolution in both these particulars aims at what I consider to be a constitutional change in the Executive Government of the country. It will take away from that freedom of the exercise of power which is vested in the Governor General in Council under Section 39 of the Government of India Act of 1833. The resolution, if carried, amounts to a recommendation to the Government of India to curtail, if not divest itself of this freedom and subject its power of "superintendence, direction and control" for a time at least to a procedure which must take priority over action by Government. This, I submit, is in contravention of the spirit and the language of the Act of 1833. It is an Act of Parliament alone that can vary or modify, in however a small degree, the power which the British Legislature has vested in the Government of India.

My Hon'ble Colleague, the Member[1] for Commerce and Industry, quotes the "Factory Act" of 1911 and apprehends much prejudice to commercial and industrial matters should my interpretation of the law be correct. I crave indulgence to point out that the "Factory Act" is an Act of the Indian Legislature and has nothing to do with the meaning or bearing of Rule 3 (*a*) of the Rules for the discussion of matters of general public interest and is wholly outside the purview of Section 22 of the Indian Councils Act of 1861. The Indian Legislature is a subordinate one and is not as such competent to deal with matters excluded by the section referred to above. Any tabling, therefore, done in compliance of an Act of the Indian Legislature, is not one that affects the "superintendence, direction and control" conferred on the Government of India by an Act of Parliament.

I am of opinion that the resolution is the thin end of a big wedge. If this is admissible the Executive Authority of the Government of India can be subjected to such limitations as the proposed resolution seeks to impose in various directions of the administrative functions of the Government of India. I feel confident this cannot be but in contravention of the provisions of the Act of 1833.

My Hon'ble Colleague, the Home Member,[2] suggests the rejection of the resolution on grounds of inconvenience and waste of time. Probably the Hon'ble Member[2] has Rule 7 in his mind as I have not been able to find any other rule under which my Hon'ble Colleague's[2] suggestion could be placed. If I am right, it will be necessary to show that the resolution is inconsistent with public interest. I think it will be difficult to establish that the procedure urged in the resolution involves any such inconsistency.

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[1] Sir William Clark.
[2] Sir Reginald Craddock.

No. 8.

ADMINISTRATION OF THE DELHI ENCLAVE.

(30th April, 1912.)

I THINK the Enclave should be established at an early date. Delay in this direction is not profitable as those that are opposed to the Delhi move may misinterpret it. As regards the scheme of its administration depicted in Hon'ble Member's[1] note, there is a great deal in it with which I agree, but at the same time there are some important points on which, I regret, I find myself unable to accept his views. For instance, as a matter of principle I would not in the Enclave unite the functions of the executive and the judicial in the same officer. I would favour the arming of the executive with greater power of control and administration but not have a fusion of the two functions as seems to be suggested in the note. I would prefer to have a Chief Magistrate of the whole of the Enclave who, with the help of subordinate Magistrates, should be responsible for city and country alike. Apart from the Magistracy there should be a chief officer of revenue who may be vested with special executive powers to meet the special needs of building up a great Imperial city. We should have a Commissioner of Police. In fact, both in substance and in form we should not have the analogy of the ordinary district administration to invidiously affect the prestige of Imperial Delhi. Provincial capital towns of Bombay, Madras and Calcutta have administrations from which we may well choose our pattern. We must not forget that India will look to the Enclave as the most perfect and advanced type of administration and I fear it will be a sad contrast with the towns mentioned above if Imperial Delhi is clothed in the rustic garb of mofassil administration.

Legislative Department A., Proceedings, October 1912, Nos. 36—42.

My countrymen are imaginative and will shake their heads when they discover that the King's capital town is no better governed than a district station. I have more to submit about other matters connected with this part of the notes but for want of time I must stop.

The acquisition of land east of the Jumna and its inclusion in the Enclave seems to be absolutely necessary. The smoke nuisance in Calcutta would not have been half so bad if the growth and development of Howrah had been controlled as the land east of the Jumna can be controlled if acquired. The difficulties of the difference in the laws of the two provinces can be easily settled.

As to the expansion of the present City of Delhi, there is much with which I agree with my Hon'ble Colleague,[1] but as I have said before I must have time to consider and then commit myself to any given views.

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[1] Sir Reginald Craddock.

On the question of the financing of Old Delhi and New, I should like to wait till my Hon'ble Colleague, the Finance Member,[1] has favoured us with his views. In this connection I may venture to say that the cost of temporary buildings may be kept as a distinct and separate account without declaring as to whether it is a part of the 4 millions or not. The time for such declaration does not seem to have arisen.

I agree with my Hon'ble Colleague, the Home Member, that taking a Town-planning Bill is not a condition precedent to the construction of the New Delhi. The first and foremost thing is undoubtedly to get hold of the land. As we go along we will consider the question of such a Bill and pass it if there be any necesssity for it.

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[1] Sir G. F. Wilson.

No. 9.

ESTABLISHMENT OF A SEPARATE HIGH COURT FOR BIHAR AND ORISSA.

(*Locus standi of the Calcutta High Court in regard to the policy.*)

(*10th May, 1912.*)

Home Department Judicial A., Proceedings, May 1912, Nos. 126—128.
(Legislative Department unofficial No. 170 of 1912.)

I APPROVE the draft letter to the Government of Bihar and Orissa.

As regards the proposed reply to the Calcutta High Court, there is one point to which I should like to draw attention. A reference to the letter received from that Court will show that the proposal to establish a High Court in the new province is not looked upon by their Lordships with enthusiasm. In fact reading between the lines of their letter it is evident that for all the prospective offer of loyal co-operation, their present attitude of mind towards the proposal is one of uneasiness as they apprehend it will *divide* their court and curtail its "*jurisdiction and powers.*" For a High Court that is known to have political leanings and to which the Bengali Press attributes marked statesmanship such a proposal cannot but be disconcerting. It is not therefore surprising that their Lordships in the fifth paragraph of their letter seek an opening to have their say on the policy apart from the technical details of the scheme. They invite us to take advantage of their peculiar "knowledge and experience" to "aid" and "influence" the decision of the Government of India on the question of the policy itself. This invitation is no more than an attempt at gaining a footing which constitutionally is denied to them. They have no *locus standi* in determining or taking part in a matter of policy. I am afraid in paragraph 2 of our reply we go very near accepting their invitation. Their Lordships deprecate confidential communications. This will no doubt lead up to the ventilation of their views in the Bengali Press. Under the circumstances I think we might modify paragraph 2 of the draft reply which I approve otherwise.

No. 10.

ENHANCEMENT OF PUNISHMENT FOR EXCISE OFFENCES IN THE BOMBAY PRESIDENCY.

(*Application of the provisions of Section 110 of the Criminal Procedure Code against habitual smugglers of cocaine.*)

(*11th May, 1912.*)

Legislative Department A., Proceedings, October 1912, Nos. 14—35.

THE case for enhancement of punishment does not seem to stand in any special difficulty. Bombay has felt for want of adequacy of punishment provided by its Excise law. The plea seems to be based on the consideration that the Courts in Bombay do not avail themselves of the extent to which the law allows them to inflict punishment. The inference to be drawn from the attitude of the Courts is all in favour of the view taken by the Home and Legislative Departments. Why invite criticism and draw attention when the existing powers have not been exhausted and found to be wanting? We have always insisted on uniformity of penal legislation in India as far as it is possible. No exceptional circumstances of a particularly appreciable character affecting Bombay have been established to make a departure from our old accepted principle.

2. As regards applying the provisions of Section 110 of the Criminal Procedure Code against persons believed to be habitual smugglers of cocaine I am unable to accept the suggestion. The power to inflict heavier punishment on such as have previous convictions ought to meet the necessities of the case. Once Section 110 of the Code is allowed to apply, the door to reception of evidence of repute and a great deal of hearsay is thrown open. To my knowledge the section is worked in the country with great severity and in many cases unjustly. On the barest of suspicion hundreds are sent to jail for long terms of rigorous imprisonment. To widen the scope of that section by grafting its provisions on the proposed excise legislation is to encourage and foster this evil that I have pointed out above.

No. 11.

POSITION OF A LAW OFFICER OF THE CROWN IN WITHDRAWING FROM A PROSECUTION.

(*26th May, 1912.*)

Home Department Judicial A., Proceedings, January 1913, No. 94. (Legislative Department unofficial No. 756 of 1912.)

THE next proposal regarding the Advocate-General of Bombay is no less open to objection. It will be grossly unconstitutional on the part of the Government of Bombay either to express its displeasure to and demand an apology from this Law Officer of the Crown. In the exercise of his discretion to enter a *nolle prosequi* he is wholly independent of the Executive Government and in no way under any subordination to it. Whatever action he takes in this respect is on behalf of His Majesty the King. We shall be treading on exceedingly dangerous ground if we invite the Government of Bombay to take such an action as cannot be constitutionally enforced, and the failure of which is not unlikely to put us in a false and embarrassing position, the exposure of which is calculated to lay us open to the charge of encouraging Local Governments to indulge in unconstitutional methods.

No. 12 (I—V).

BILL FOR THE REGISTRATION OF CHARITABLE AND RELIGIOUS ENDOWMENTS IN INDIA.

I.

(5th June, 1912.)

Home Department Judicial A., Proceedings, February 1913, Nos. 142—151.

(Legislative Department unofficial No. 226 of 1912.)

THE principal point for consideration is whether the Bill is a departure from any fixed and accepted policy of Government. If it is, very strong and exceptional grounds should no doubt be forthcoming to justify its acceptance. It has been urged that the provisions of the Bill are not in accord with the position taken by Government in 1863 and steadily maintained since then. I am unable to agree with this view, as the Bill seems to be particularly regardful of the provisions of Act XX of 1863. That Act freed Government from the responsibility of superintending land or property belonging to any mosque, temple or other religious establishment. The Bill in question does not in my opinion traverse these provisions in any manner whatsoever. In fact it is not a Bill that has anything to do with the possession or superintendence of a trust property, save in so far as purely a matter of audit goes. Then again, even in this matter of audit, the Bill specifically excludes from its operations such trust properties as are relegated to purely religious purposes. It in no way lays any obligation on Government to concern itself with, superintend, scrutinize or control such trusts as are created or set apart for religious purposes only. The Bill provides the procedure by which differentiation between the public charitable and religious portions of a mixed trust can be determined. This is to be effected either by the terms of the instrument of trust, if there be any, or an assignment made by the trustee in his discretion. There is a clear provision in the Bill that such trusts as are in this manner determined to be for religious purposes are excluded from its operations. It seems to me, therefore, that where the instrument of trust has fixed the proportion, the part set aside for religious purposes can in no way be interfered with by Government, and in cases where there is no instrument at all or it is silent, the trustee of a mixed trust has discretion to declare what part of it shall be for religious purposes and, as such, not subject to the provisions of the Bill. I do not understand how this measure can be condemned on the ground that it is a departure from the policy of non-interference with religious trusts. Under the Bill no interference with such trusts is contemplated nor is it possible, save and except with the full concurrence of the trustee of a mixed trust of which the deed of

endowment is either non-existent or silent on the proportion of benefit to go to either of the two objects.

2. If my view as regards the criticism touching the alleged departure of policy is correct, the next matter for consideration is whether the measure will serve any good purpose. As to this I do not for a moment think the contemplated legislation is without defects or imperfections. It is not sufficiently comprehensive, and possibly in its practical application to concrete cases it will disclose greater demerits and shortcomings than are anticipated by Secretary[1], but these are matters of detail inherent in human laws and are remediable by subsequent amendments and consolidation in the light of the experience gathered by efflux of time. What we have at present to see is whether it will subserve a fairly substantial balance of good, compared with the existing conditions which it is intended to improve and ameliorate. Those who are acquainted with the administration of public trusts in the hands of private individuals in this country, whether going under the names of *Motawalli*, *Nazim*, *Shebait* or *Mahant*, are well aware of the gross corruption, misappropriation and misuse that are rampant. Why should such trusts as are for public charitable purposes be left in this unsatisfactory state passes my comprehension. I do not for a moment accept the dissociation of Government from the concerns of trusts created for purely religious purposes as desirable but, as I have endeavoured to show above, the Bill being limited in its operation to trusts of a public charitable character, I do not wish to deal on this file with what I think is an unwarranted abnegation of Government authority. Confining my submissions then to public charitable trusts only, I venture to assert that the State has a solemn and clear obligation to fulfil in this connection. Whatever may be the ethical standard of State supervision over such trusts in Europe I make bold to claim for the East that the juristic notion of Orientals on this point is pristine and their conception of State obligation to control, protect and foster such charities will not compare unfavourably with the more fortunately circumstanced opinions of the nations of the West. There is a marked desire on the part of thoughtful Indians to insist on legislation that will secure the necessary reform. Whereas I do not doubt that the desire has received expression as a result of the well-ordered environments of British rule in India, I cannot persuade myself to accept the proposition that the desire itself has received its birth in any "newly formed ideals." Those that care to read vernacular papers will find that Indian editors innocent of touch with western learning and jurisprudence are no less clamouring for Government action than that product of British rule "the educated classes" whose aspirations are not infrequently looked upon with misgivings by those that are originally responsible for the appearance of this phenomenon on

[1] Sir William Vincent.

the social and political horizon of the country. It is a class that represents the intellect of the people, may be largely influenced by European thought, but by no means isolated from the bulk of the various communities it represents. Things are moving fast in India, and in India, and in the last decade orthodox institutions like the *Nadwatululama* and many Hindu and Sikh *sabhas* have created a volume of public opinion harmonizing with the views of "the educated classes." It is true that the entire population of India is not imbued with a common all-pervading idealism, but to suggest the numerical inferiority of the thoughtful portion of the population as a ground for disregarding their sentiments is to ignore forces of the utmost count in the body politic. These people want legislation to facilitate the proper and honest administration of the public charities of the country. Can it be denied that their cause is just? To ask them to develop sufficient public spirit and not to worry Government with legislative propaganda involving addition to State responsibility is to deny them the employment of the most effective agency in the uplifting of the people. Statutes of England are the landmarks of her development and progress. Even to-day the Mother of Parliaments is occupied with an important disestablishment programme. To tell the supporters of the Bill to shift for themselves and create public spirit does not seem to be the most commendable answer from a Government whose just claim to distinction has been the rôle of the *ma-bap* form of administration. To refuse them sympathy on the score of the civil courts and the institution of regular suits against dishonest trustees can be justified on one and one hypothesis only and that is that experience has shown such a course to be simple, expeditious and inexpensive. Simple it is not, as the frame of the action must involve, apart from the preliminary sanction, all the complications of procedure attending a regular suit that has to try many issues not the least difficult of which is the allegation of the breach of trust. Expeditious it cannot be, as the life of a contested case in our civil courts is longer than that of a proverbial cat. It is common knowledge that a case of this type takes years to finish. Inexpensive it is bound not to be as the plaintiff has to fight against a dishonest opponent in possession of the property the proceeds of which he freely employs for the engagement of eminent counsel and the buying of witnesses. In all conscience this is a thorny and perilous path that is pointed out to the supporters of the Bill to tread. No wonder cases of this type come to court only when there is personal malice or cupidity to move the plaintiff To the ordinary worshipper or a person interested only as a member of the public in the proper administration of a trust this laboriously cumbrous and complicated machinery is nothing less than a denial of justice and to dishonest trustees a premium on maladministration. Moreover, the scope of the Bill is different from the scope of the provisions of the Civil Procedure Code. Registration

and audit are the *raison d'être* of the Bill, whereas allegations of breach of trust are the basis of action under the Code.

3. Reference has been made to Act XXI of 1860 as one of the safeguards already in existence and as such it is suggested the Bill in question is a superfluity. I am afraid it has not been sufficiently appreciated that the Act is essentially distinct and different in its aims and objects from the Bill. It deals with societies with a minimum number of seven members to start with, and has no application whatever to such endowments and trusts as are in vogue in this country and have nothing in the nature of a society or association in them. Moreover these societies are subject to dissolution and the benefits liable to transfer to other societies. These features are not in agreement with either the Islamic or the Hinduistic notions of grace which follow from the vesting of the endowed property in God. I may, with great respect, say that Act XXI of 1860 furnishes no remedy with regard to charitable trusts of the kind and class with which the Bill deals.

4. The next Act quoted is the Official Trustees Act of 1864. To begin with this Act is of no help so far as trusts that have already been created without any reference to it are concerned, and their number is legion. Then again the property vests not in God but in the Official Trustee. There is a third difficulty which is not unworthy of consideration. Mostly trusts of a mixed character are created by one and the same deed, and the separate charge for public charitable purposes is either made on the entire trust property or is left to the discretion of the trustee. Piety and grace in the eyes of God are generally the motive for such endowments, which not unnaturally dictate the appointment of a trustee of the same religious persuasion as the donor, not to speak of the almost universal practice of constituting the donor himself as the first *Motawalli* or *Shitaet* for life. These circumstances render resort to the Official Trustees Act, which applies to purely charitable trust only, well-nigh impossible in the majority of cases. Similarly the provisions of the Charitable Endowments Act of 1890 suffer from incompatibilities that give no hope of relief in the direction in which the Bill does.

5. On the consideration of the above facts and circumstances I venture to think there is a call for legislation to regulate the administration of public charitable trusts. So far as the principles of the Bill under notice are concerned I find nothing in them open to objection, as I think the least that ought to be done is to register such trusts and apply to them an effective system of audit.

6. The Bill is somewhat meagre and obviously undue reliance is placed on the rule-making power under Section 10 (*1*). The power to inquire for the purposes of making a correct registration should have been specifically laid down in the Bill. As

regards Secretary's[1] remarks touching the option of the trustee of a mixed trust to get out of the provisions of this Bill, I would like to point out that the option seems to have been deliberately given for fear of treading upon the policy of non-intervention on which Government seems to insist in reference to religious trusts. For the regulation of audit the rule-making powers appear to be extensive enough. It is not necessary that the auditor should be a lawyer. For every registered trust the Registrar could be authorized to issue necessary instructions as to the character of the charities on the basis of which the audit could be made. There is no reason why the auditor should not have power to check the correctness and genuineness of vouchers; I know accounts are faked under the circumstances noted by Secretary,[1] but that can hardly be a reason for not calling for any accounts at all. The man who fakes accounts knows he lays himself open to a charge of forgery, and that ought to be some deterrent and thereby secure if not complete at least a partial application of trust money to deserving objects.

7. I doubt if there is any great probability of women and priests ever troubling themselves about this Bill if it is passed into law. It sets free all religious trusts and is not likely to be unpopular with any class of people except dishonest trustees of public charitable endowments who, as a matter of fact, are little respected anywhere in the country.

8. Considerations of the "Sircar" receiving the odium of accepting an unpopular non-official Bill do not, to my mind, arise here, as I have no doubt that not only the educated classes but many others will welcome the measure, but even if such considerations arose I see no reason why a non-official Bill should be treated worse than an official one if the expediency of the passage of each stands on the same level.

9. The question of the cost of prosecution can hardly be raised as an objection to the measure. The Government is clearly responsible for eradicating and suppressing the crimes of forgery and embezzlement in the country. One or two cases in the beginning may involve some expenditure, but once the situation is firmly dealt with, the punishments awarded will be sufficient to keep down and arrest the growth of such offences.

10. The point of law raised by the Hon'ble Mr. Wheeler[2] as regards the power of a trustee of mixed trusts to make assignments is no doubt of considerable importance, and I agree with Secretary[2] that it may be successfully contested in the courts. The case law of India gives little help to solve the problem. The tendency of Islamic jurisprudence is strongly in favour of respecting the discretion of a trustee if it has been exercised in good faith and with due regard to justice and fairness. The point

[1] Sir William Vincent.
[2] Secretary in the Home Department.

is somewhat less clearly enunciated in respect of endowments created by Hindus. But these uncertainties, if there be any, do not, to my mind, call for an immediate action so far as the provisions of the Bill go. The legislation under consideration confers on a trustee of the particular description and under particular circumstances the legal right to exercise his discretion for the purposes of registration. Doubt has arisen whether a succeeding trustee may not question the action of his predecessor. It is exceedingly unlikely that in the majority of cases such a contingency will arise, but even if it did, succeeding trustees cannot evade the provisions of the Bill as long as the registration stands. I am disposed to think it will be premature to enter the solution of this question as it may more conveniently be considered after such an objection has been taken and the courts have given their decision on the same.

11. I have given my very earnest consideration to the objections raised by Secretary[1] regarding the undesirability of vesting criminal courts with jurisdiction to try cases of failure to comply with the provisions of the Bill. There is a great deal of force in what Secretary[1] has urged against this provision, but the measure is a modest one, the penalties imposed are very small, and the giving effect to penal clauses may not on principle inappropriately be left to the criminal courts.

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II.

(*11th July, 1912.*)

THE protection and proper administration of public charities and endowments is a matter of such importance that I should have preferred action *ad hoc* in our own Legislative Council but as that is not feasible in the near future, the only alternative is not to stand in the way of local legislation.

As rgards clause 19 (*a*) its provisions are, no doubt, somewhat exceptional but they are, it is to be remembered, intended to meet exceptional conditions.

III.

(*16th July, 1912.*)

SINCE we noted upon it last, the Bill has considerably improved in the last Select Committee. I had advised the grant of sanction even before this improvement was effected and am naturally far more willing to do so now. I do not for a moment claim perfection for this proposed measure; on the contrary, it seems to me the Bill

[1] Sir William Vincent.

is too modest and suffers from defects which might be removed by giving it greater effectiveness but I join issue with the Home Department in that it is of "little or no value." In the absence of any prompt and reasonable means of getting at the administration of charitable trusts, the Bill will supply a much needed want and I feel that our refusal to countenance it will be a real hardship.

No definition of the words "secular or charitable purposes" is given and it is urged that this is unsatisfactory. I cannot help thinking that the Select Committee has acted wisely in not attempting a task which is well nigh impossible to accomplish. It will be seen on consideration that a hard and fast definition of the terms in question will never do. These terms are well known and have been construed by our Courts in the light of the particular facts of a given case; and I must confess that I have no apprehension on the score of indefiniteness in this connection. The happier position, no doubt, would have been to apply the provisions of the Bill to all trusts whether "secular or charitable" or not. Failing this, safety seems to lie in leaving the determination of these terms to the Courts.

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IV.

(8th August, 1912.)

I HAVE on various occasions noted on the expediency of Government recognizing the obligation of preventing the fraud on, and wholesale misappropriation of, trust properties that are rampant in the country. I am strongly of opinion that the Bill should be given a chance and its introduction in the Local Council allowed.

The proposals of the Hon'ble the Home Member[1] will not, in any sufficient and appreciable degree,—I put it respectfully,—meet the evil. Most of what my Hon'ble Colleague has suggested is at present within the competence of the Civil Courts. Whatever is done to expedite proceedings, if the Civil Courts alone are to be the medium, there is no hope of bringing about any real reform.

V.

(13th August, 1912.)

MY Hon'ble Colleague, Sir Robert Carlyle,[2] in his note of the 9th of August charges me with having defended an "appallingly bad Bill." If he had done me the justice to read my notes on the Bill in question with care, he would have seen that I had defended the main principles of the Bill and not its form or details of drafting. In fact I did advert to many defects of the latter description in my

[1] Sir Reginald Craddock.

[2] Member for the Department of Revenue and Agriculture.

note and only took my stand on the soundness of the principles of the Bill in so far as they appear to me to involve no departure from the principles of Act XX of 1863 ; and it was only in regard to detail that I pointed out in my note[1] of 5th June 1912 the possibility of the Bill disclosing greater defects in its practical application to concrete cases than were anticipated by the Hon'ble Mr. Vincent.[2] My Hon'ble Colleague[3] looks upon this admission as inconsistent with the aspirations of the Legislative Department. He does not seem to appreciate the important consideration that the Bill in question is not a Government of India Bill but that of a Local Government and that the duty of the Legislative Department in regard to Bills introduced in Local Councils is confined to an examination of the general principles and does not extend to scrutiny of minor imperfections and shortcomings or details of drafting. As far back as 1871 Sir James Fitz James Stephen in dealing with this subject summed up the position as follows :—

In a few words, for any very glaring and serious fault, the power of veto is at once a security to the public and a proper rebuke to the subordinate legislature. For minor imperfections and shortcomings, the local legislature, and it alone, ought to be responsible.

In more recent times Sir Erle Richards in 1908 was of the same view and emphasised the practice of the Department by holding that it was safe to " leave the Local Government to settle details." The explanation to Rule 30 of Executive Business lays it down in as clear language as possible that the examination of a draft Bill of a Local Government by the Legislative Department shall ordinarily be confined to general legal principles and shall not be deemed to involve the examination of matters of form or details of drafting. In these circumstances, I venture to point out that it would be unreasonable to say that the legitimate aspirations of the Department over which I have the honour to preside have been disregarded by me. I also submit that there is no justification for the observations of the Hon'ble Member[3] comparing my views with those of Members of the Bombay Legislative Council. Our duties as regards Local Bills are entirely distinct from the duties of those in direct charge of such measures. The revised Bill sent up by the " Bombay legislators " is an improvement in many respects on the former one but it presents absolutely no radical change of principles and that is what we are concerned with, although we are none the less gratified at the improvement effected in matters of detail and drafting.

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I have hardly anything more to say on the papers that have come in circulation than what has been so ably and lucidly brought

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[1] Page 25 *supra*.

[2] Secretary in the Legislative Department.

[3] Sir Robert Carlyle.

out in the note of the Hon'ble Sir Harcourt Butler.[1] I agree with every word of his note, which has, if I may say so without impertinence, very correctly gauged the position of the Government of India, of Local Governments and public opinion in regard to the Bill in question. I also give my hearty support to my Hon'ble Colleague in the suggestion that a strong and representative committee should be appointed to enquire into the question of public trusts in India generally.

[1] Member for the Department of Education.

No. 13.

LEGISLATION TO CONTROL COTTON GAMBLING.

(*Definition of "gaming."*)

(*25th June, 1912.*)

Legislative Department, A., Proceedings, February 1913, Nos. 1—7.

In a recent case the Calcutta High Court has held that the well-known form of gambling known as cotton gambling is not "gaming," but wagering. As the law in Bengal does not make wagering an offence, the result is that the evil of cotton gambling is spreading in Calcutta without any check whatsoever. Some of the daily papers report that, on the day their Lordships delivered judgment in the above case, no less than 25 cotton gambling shops were opened in one street, and that a roaring business was being carried on that very day. The question is what should be done to eradicate this evil. The answer to this question depends on a number of considerations, but they may be divided under two heads first ; the remedy itself, and, second, the way in which it can be given effect to.

Firstly, as regards the remedy, the most efficacious is to declare that all wagering is included in gaming, as is the law in Bombay. The objection to this is that betting on horse-racing will be covered by the amendment which may be resented by an influential class of Calcutta society. The answer to this is that since 1890 the amended law has been administered in Bombay, and for a period of 22 years it has not been applied to horse-racing there, and that there is no reason why the executive in Bengal should not wink at betting on horse-racing, as it has been doing in Bombay. Then there is a suggestion that an exemption may be made in favour of betting on horse-racing, whilst all other forms of wagering may be included in gaming. This is open to the grave and serious objection of creating invidious distinctions by legislation which will stand out in very striking contrast with the law in Bombay and may conceivably present the Indian Legislature in a somewhat odious character. There was a suggestion from Bengal last cold weather when they sent up a Bill on the subject to the Government of India for preliminary sanction to introduce in the Local Council. It proceeded to confer on the executive power to declare any kind of betting, gaming or wagering to be included in "gaming." It was not possible for the Government of India to agree to so much to be left to the individual discretion of the executive Government, nor could it be consistent with the ordinary rules of jurisprudence. The Bengal Government was not prepared to accept anything less and felt no disposition to consider our suggestion to legislate on the lines of the Bombay Act, I of 1890. Now that the High Court of Calcutta has clearly shown the impotency

of the present gambling law in Bengal, the simple and straightforward course seems to be to amend the law and wheel it into line with the Bombay Act. Papers like the "Statesman" and the "Englishman" will not be slow to attack the measure as a departure affecting the Turf Club and the popular pastime of racing. This has to be faced if we at all intend to grapple with the evil of cotton gambling without laying ourselves open to the charge of favouritism. I may mention that it is impracticable to deal with cotton gambling specifically, as was the case with rain gambling, the conditions being totally different. A simple change of name from cotton to some other article or a slight alteration of circumstances will be sufficient to put the law at defiance.

Secondly, as to the means by which the remedy may be given effect to, there are three ways in which the subject may be dealt with —*1st*, the Government of Bengal to take up legislation in its own Council when one is formed. There seems to be little prospect of the new Council sitting before January next, and the delay would seem to prove disastrous in the meantime; *2nd*, the Imperial Legislative Council to deal with the evil in the next session at Simla. The element of delay is present here also which cannot be overlooked: *3rd*, promulgation of an Ordinance. Under Section 23 of the Indian Councils Act, 1861, it is within the competence of the Governor General in Council to give effect to a measure by an Ordinance in cases of emergency. I am disposed to think that this is an emergent case as the evil is reported to be spreading in an alarming way. Considering all the circumstances and conditions in Bengal, an action by the Government of India in the direction pointed out above does not seem to be out of place. It has to be remembered, however, that whatever action is taken, reference to the Local Government concerned for an expression of its views would be necessary. However great the evil may be, the immediate and direct responsibility of checking it rests with that Government, and as such it appears to me proposals to the Government of India should be submitted by the Government of Bengal.

No. 14.

INCREASE OF COURT FEES IN ORDER TO DISCOURAGE THE INSTITUTION OF VEXATIOUS OR FRIVOLOUS COMPLAINTS.

(8th July, 1912.)

Home Department Judicial A., Proceedings, October 1912, Nos. 87-88.
(Legislative Department unofficial No. 313 of 1912.)

In the absence of definite information regarding the income from court fees and the expenditure on the administration of justice it is difficult to appreciate the question raised on this file. I am unable to accept the suggestion that an increase in the fees will discourage the institution of vexatious or frivolous complaints. These are prompted by malice and other sordid motives which will hardly receive any conceivable check by the mere imposition of an additional eight-anna fee on a petition of complaint. On the other hand I apprehend that such an increase may seriously affect the poor but genuinely aggrieved complainant and may deter him from invoking the help of the Courts to redress a real wrong. Such a circumstance as this cannot be looked upon as conducive to the wholesome development of society. I am unable to subscribe to the view of the Hon'ble the Home Member[1] that the rise in the efficiency of the administration of justice is a justification for enhancing court fees. One of the primary duties of the State is to bring justice to the door of every member of society without taking a toll for it but if this is not possible for financial reasons the minimum of charge alone can be permissible for rendering that which is an administrative obligation and should, if possible be given freely. The view that a complainant is a customer and comes to Court to obtain justice in accordance with certain well-known specified principles but that, his is a transaction in no way bearing upon society at large is one that will not bear a moment's scrutiny. It appears to me that any suggestion of the enhancement of court fees can rest on financial consideration alone, and that the subject can be treated from the standpoint of a source of revenue only, for which considerable examination is a condition precedent.

[1] Sir Reginald Craddock.

No. 15 (I—II).

THE SINDH MUSALMAN LANDHOLDERS EDUCATION CESS BILL.

I.

(23rd July, 1912.)

Legislative Department A., Proceedings, December 1912, Nos. 3—7.

IF the Muhammadan landholders of Sindh are in earnest and desire to tax themselves in the interest of advancing the education of their own community, I fail to see what serious objection there can be to giving our approval to the Bill. The suggested imposition is of the mildest character and can hardly count for standing as a possible difficulty in the way of any future enhancement of land revenue in Sindh. There seems very little force in the objection that the tax may be easily passed on from the landlords to the tenants. It is really too small to cause any such trouble. Moreover, the Local Government could not neglect to keep a watchful eye on any such development. If this were an argument of any weight the periodical enhancement of our land revenue would stand condemned. I strongly support Sir Reginald Craddock[1] in the view that it is a step in advance in self-help. If the Government of India, for reasons that I need not go into at present, is unable to provide extensively for education and there is a genuine desire on the part of the people to supplement Government efforts by imposing a cess on themselves, it would hardly be right for us to withhold our sympathy and support from such a laudable project.

II.

(2nd September, 1912.)

I AM unable to find any strength in the argument of the incidence of the tax falling on the tenant. If this were so, all the enhancement of Government revenue and cesses on revaluation imposed on landlords periodically in most parts of India would stand condemned. I bow to the expert knowledge of my Hon'ble Colleague Mr. Gillan,[2] but I respectfully urge that theories are open to modification under the stress of peculiar and local conditions. The Muhammadans of Sindh for various reasons stand on a different footing from the other communities of India and the question of precedent does not, therefore, necessarily arise. I support the order passed in Council.

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[1] Member for the Home Department.

[2] Member for the Railway Department (Railway Board).

No. 16 (I—II).

POWERS OF A NON-OFFICIAL MEMBER TO INTRODUCE PRIVATE BILLS IN THE LEGISLATIVE COUNCILS.

I.

(4th August, 1912.)

Legislative Department A., Proceedings, July 1914, Nos. 6—22.

A QUESTION of great moment regarding the powers of a non-official Member to introduce private Bills into a local Legislative Council has been raised by a Provincial Governor of high repute and standing He fears that the present constitutional position gives such a member an almost unrestricted liberty to move for introduction and that this in itself may lead the debate into discussion of matters that may be highly prejudicial to good government and harmful generally. In his opinion mischief is likely to result from the mere opening debate even if the Council ultimately disallows the introduction which he thinks is not a very safe contingency to rely upon considering the preponderance of non-official majority in such Councils. He is therefore of opinion that the simplest safeguard against such risks is to subject the introduction of all private Bills to the previous sanction of the Governor General in Council. It is not very clear whether he would apply this safeguard to the introduction of private Bills in the Supreme Council also. One should think that the danger referred to by him, if there be any, is of equal if not greater magnitude in the case of the Governor General's Councils, as, after all, its official majority does not affect the stage at which the mischief is apprehended and, on the other hand, the range of discussion may involve matters of imperial rather than provincial import. If this view is correct, it wi be hardly possible to differentiate between Councils when the danger would appear to be common and the suggested safeguard of equal applicability to all. It is, however, necessary to examine in this connection the constitutional powers of the non-official Member of the Supreme Council and of the Provincial Councils before pronouncing on the merits of the proposed innovation This seems to be the more important as sufficient consideration does not seem to have been given to the limitations which the existing statutes have placed on the powers of a non-official Member to introduce a Bill.

It will not serve any purpose to travel further back than the Indian Councils Act of 1861 to put these limitations in clear perspective. I may mention that I am avoiding at present reference to the powers of disallowance which the Governor General in India and His Majesty the King in England have after a legislative measure has been passed by Council. This is only right as the point under consideration is the examination of existing safeguards antecedent to the introduction of private Bills and not subsequent thereto.

So far as the Supreme Council goes, its legislative powers have been so restrict d by Section 22 of the Act that any constitutional change of Government has been put wholly beyond its competence. This section of the Act is sufficiently comprehensive to lay aside all anxiety with reference to legislation that is likely to touch any such crucial points in the relation of England with India as allegiance to the Crown, Parliamentary control, military discipline, certain aspects of fi cal policy and numerous other Imperial concerns of administration and control embodied in the various statutes known as the Government of India Acts and the Indian Councils Acts. This statutory bar excludes in fact the whole range of questions that may conceivably bear upon British suzerainty and governance of India. These are the very first principles of the integrity of the empire, and the wisdom of excluding matters of such momentous imp rtance from the deliberations of the Councils cannot be doubted. The second but less stringent exclusion is provided for under Section 19 of the Act. It restricts the freedom of introduction in respect of certain kinds of Bills by subjecting it to the previous sanction of the Governor General. These Bills are measures affecting—

1. The public debt or public revenues of India, or by which any charge would be imposed on such revenues ;
2. The religion or religious rights and usages of any class of His Majesty's subjects in India ;
3. The discipline or maintenance of any part of His Majesty's military or naval forces ;
4. The relations of the Government with foreign princes or States.

As regards local Councils, the restrictions fall under the provisions of Sections 38, 42 and 43 of the Act. Under Section 38, previous sanction of the Provincial Ruler is necessary with regard to Bills affecting the public revenues of the province or by which any charge sha l be imposed on such revenues. Section 42 is altogether prohibitive more or less on the same lines on which Section 22 is enacted and in addition fixes the territorial jurisdiction of local legislatures. Section 43, on the other hand, makes it unlawful for local Councils except with the previous sanction of the Governor General to make regulations or take into consideration any law or regulation affecting—

1. The public debt of India, or the cust ms duties, or any other tax or duty now in force and imposed by the authority of the Government of India for the general purposes of such Government ;
2. The regulating of any of the current coin or the issue of any bills, notes or other paper currency ;
3. The conveyance of letters by the post office or messages by the electric telegraph within the Presidency ;

4. The alteration in any way of the Penal Code of India as established by Act of the Governor General in Council, No. 45 of 1860;
5. The religion or religious rights and usages of any class of His Majesty's subjects in India;
6. The discipline or maintenance of any part of His Majesty's military or naval forces;
7. The regulating of patents or copy-right;
8. The relations of the Government with foreign princes or States.

In other words the very introduction of a Bill touching any of the eight heads detailed above is illegal without the previous sanction of the Governor General. As these heads evidently relate to matters of more than provincial interest and concern the Indian Empire as a whole, they have been taken out of the ordinary cognizance of local Councils.

A careful appreciation of these statutory restrictions on legislative initiative whether in the Imperial or the Provincial Council will show that such initiative does not stand on a high plane of independence. The Indian Councils Acts have to be construed together, and it would appear that they have been designed to cover as much ground in favour of executive control as is possible short of a total denial of the right of introducing a Bill without having to seek previous sanction. The restrictions are so numerous and varied that one will be hard put to discover a legislative measure of any great administrative significance that will not fall within one or more of the prohibitions absolute or qualified. The Act of 1861 which in fact is the main exponent of the policy governing the principle and practice of legislation in British India was intended to curtail and narrow down all independent initiative to almost the vanishing point and was therefore not improperly described as a measure which aimed at suppressing Sir Barnes Peacock. It will be observed that the Act does not with reference to the introduction of a Bill distinguish between Members of Council. Member or Additional Member, official or non-official, all are treated alike, and the previous sanction does not depend for grant or rejection on the Government but the individual will of the Governor General or the Provincial Ruler as the case may be. Considering the auspices under which this Act was passed and the environments in which it was conceived one can hardly wonder at the rigour with which it has cut down the freedom of Indian Councils to inaugurate and undertake legislation. Sir C. Wood, who was the father of this Act, made a significant observation when it was going through Parliament. He said "it is quite impossible to revert to a state of things in which the Executive Government alone legislated for the country." Perhaps this is accountable for his not having completely negatived

all independent initiative whatsoever without exception as is now sought to impose. Last September the question cropped up on a Despatch of Lord Crewe dealing with the introduction of the Elementary Education Bill and the Musalman Waqf Validating Bill in the Supreme Council. His Lordship considered that " the imposition of unnecessary restrictions on the functions of Members of the Legislative Council must be avoided " but expressed an unmistakable desire to exercise some control by rules or procedure over their functions before a " project of legislation was published." This led to the consideration by the Government of India of not only the statutory right of a non-official Member to introduce a Bill but also of the policy underlying it. In noting on the case I made some observations which I crave permission to quote :—

> " Now that the Councils have been enlarged and there is a genuine desire that they should afford opportunity to non-official Members to initiate legislation, it will be, I venture to think, a retrograde step to restrict their function further than is already by the rules in force. Bills affecting the revenues of India and such as are specified in Section 19 of the Councils Act (1861) seem to be sufficiently protected. To narrow down the powers of the non-official Members still further is to deny them a privilege without which much of the utility and the educative force of the Councils will be affected."

My late lamented Colleague Sir John Jenkins,[1] whose knowledge of Indian conditions was vast and whose breadth of view and political insight always commanded my admiration, did me the honour to endorse my opinion in the following words :—

> " I associate myself with the Hon'ble the Law Member's remark as to the expediency of allowing the non-official Members as much scope as possible. It would be most impolitic to attempt to introduce any new restrictions outside the law except such as are actually necessary for the proper conduct of business under the conditions prescribed by the law."

After discussion in the Executive Council the Government of India sent a despatch to the Secretary of State containing the following :—

> " If Your Lordship's desire is that any rules should be made which would restrict the power of non-official Members to introduce Bills into the Legislative Councils and make it incumbent on them to obtain the sanction of the Secretary of State prior to such introduction we consider that the proposal is open to grave objection. Members of the Legislative Council have certain statutory powers and the legality of any attempt to restrict these powers by any rules of procedure would be open to question. It would also, in our opinion, be most impolitic to make any such attempt."

Though the circumstances narrated above relate to what happened in reference to proceedings in the Imperial Council the significance attached to them applies with no less force to local Councils. What is now suggested is that if the little freedom which Members

[1] Member for the Home Department.

enjoy at present cannot be taken away by the rules framed under the Acts, the law itself must be changed. In view of the growing tendency of Indians to develop talent and taste for politics it is considered inexpedient to leave them any opportunity whatsoever to introduce any Bill without the previous sanction of the Governor General. I cannot help thinking that there is some fear of the unknown that has prompted the suggestion. All legislation of substance affecting matters of high policy such as fiscal, foreign, military, religious, administrative and constitutional is, as a matter of fact, under the existing law effectively put out of the independent reach of the Councils. What really remains to them is a narrow avenue through which it is open to them to pick their way with difficulty to the introduction of some innocent measures of social and moral utility parochial and confined in their operation. In the words of Sir Erle Richards to put an executive embargo on this is "to reduce their powers, small as they are, to absolute nullity." The semblance of independence which the Councils possess serves to impart to them an outward glamour without any of the reality of the legislative assemblies of advanced countries. The question then is whether even this semblance is in any form a menace to the maintenance and continuance of British administration of India without any loss of efficiency. I am disposed not only to answer the question in the negative but to say that however shadowy and unsubstantial the existing right of independent initiation may be, it is not without value in meeting the charge of absolute executive autocracy that is not infrequently laid against British occupation of the country. The recent enlargement of the Councils and the concession of non-official majority in the Provincial legislatures have gone far to reconcile advanced Indian thought to moderate views. It is believed that these are evidence of an earnest desire on the part of the rulers to govern through the people. This belief, in my humble opinion, is a great asset and should, under no circumstances, be trifled with or weakened. I therefore think that the suggestion under consideration, if carried out, cannot but come as a rude shock to those who have put their trust in the liberalising influence of British rule in this country. Royal promises and proclamations, pronouncements of great ministers and pledges of the utmost solemnity have been given from time to time, and it appears to me that it will be the first break down of British statesmanship if the hold on India is attempted to be strengthened by such a reactionary measure as this. The desire to burke discussion of public questions and popular rights seems to be at the root of the present proposal, and it is hard to believe that its acceptance will not ultimately lead to the withdrawal of the right to move resolutions and put questions. Such discussions are of incalculable advantage in gauging the trend of public thought and in feeling the pulse of the people, without which administration cannot rise beyond the level of hole and corner methods. In the present conditions of India such a course will be a repression attended with the results

that follow the sitting on the valve, and I think we stand to lose much more than gain if this ungenerous and dangerous innovation is adopted. It is far too late in the day to start with departures that are contrary to the genius of British rule.

II.

(14th October, 1912.)

A BILL seeking to impose a tax is, in my opinion, closely connected with and bears upon the public revenue of the country. Obviously it invokes the authority of the State to introduce some new feature in the existing conditions of such revenue and if passes into law will bring in an increase which must be accepted to alter the existing fiscal conditions. The increase itself connotes a change which seems to be sufficient to bring such a Bill within the purview of Sections 19 and 38 of the Indian Councils Act of 1861. The word "affecting" in these sections, I venture to think, bears a larger significance than has been accorded to it by Lord Hobhouse. If the narrow construction implying "prejudice" were accepted as the correct one, it would secure a measure of freedom in favour of Members of Council inconsistent with the spirit of the entire Act. It was well known at the time it was passed that it was intended to suppress Sir Barnes Peacock. Moreover the debate in the House of Commons is illuminating enough to hold that the sponsors of this Act clearly intended to centralise authority regarding permission to introduce any Bill which in any manner, whatever, appreciably touched the imposition of a tax. But apart from any assistance we may receive from their speeches, and however questionable that may be from the standpoint of the strict canons of interpretation of statutes, the ordinary meaning of the word "affect" in the English language, as I understand it, is to produce a change of any kind. As the word has no technical significance the plain meaning of it must prevail, and I should think that a Bill purporting to produce a change of condition in the public revenue whether for or against would be governed by Section 19 or 38 of the Act as the case may be. In the latter section the qualifying words "of the Presidency" appear to be used in relation to the local jurisdiction of the legislature rather than any other classification of the public revenue. All taxes imposed and collected by the State form the public revenue of the country, and the section does not appear to me to aim at any fiscal differentiation.

2. Section 43 of the Act stands on a different footing altogether. It prohibits a local legislature from taking into consideration certain measures without the sanction of the Governor General. For the purposes of the present reference the matters mentioned in head (1) only of that section need be considered. They are the public debt

of India, the customs duties, or any tax or duty that was in force and imposed by the authority of the Government of India at the time the Act was passed. The meaning of the section seems to be that among other matters those specified above will be good ground for prohibition against a measure being taken into consideration if it bears on any of them in such a manner as to produce a change. I am disposed to think that the change contemplated must be of a direct character and an immediate result of the measure if passed. A remote, far-fetched and speculative bearing will be a strain on the meaning of the word "affecting" used in the section. In any event it has been rightly pointed out in the notes of this Department that the determination of the character of the change is a question of fact. My own view is that the Sindh Education Cess Bill is not covered by the section.

No. 17.

LEGISLATION FOR THE PROTECTION OF WOMEN AND GIRLS.

(7th August, 1912.)

Home Department Judicial A., November 1912, Nos. 131—150. (Legislative Department unofficial No. 357 of 1912.)

I AGREE generally with the views expressed by Secretary[1] in his very able note of the 1st of August 1912, but there are two points on which I wish to express my opinion as it is not in accord with his. He has dealt at length with the protection which the English law gives to minor girls and is of opinion that we in India should take up legislation on the same lines. There is much in that law that will furnish us with a good basis for action, but some modification seems to be necessary to suit Indian conditions. I am not, for instance, disposed to give any power to the police to interfere or initiate proceedings, as I apprehend it is more likely to be used for purposes of blackmail than inculcation of morality. It has to be remembered that in India professional dancing-girls and musical *artistes* are largely identified if not almost entirely with the class of prostitutes. These women carry on a fairly lucrative trade for the propagation of which they rear up either their own daughters or of others and will not, therefore, infrequently fall a prey to the exactions of the police. I would therefore put the matter wholly out of the cognizance of the police. I venture to think it will be impolitic to do otherwise so long as the reputation of the Indian police for honesty stands where it does. I would provide for initiation of proceedings on complaints by any one other than the police or by the magistrate on his own knowledge or suspicion. This will sufficiently insure the institution of proceedings in cases of real evil.

The second point is the one relating to the provision of the English law for industrial schools to which minor girls may be sent for care and bringing up. There is a great deal to say in favour of making over girls to individuals of admitted respectability and I sympathise with Mr. Vincent[2] when he points out that Government industrial schools are likely to be confounded with reformatories that have almost all the incidents of a prison. The fact should not be lost sight of that the class of minors to whom the proposed measure will apply ordinarily belongs to that of prostitutes and that in their case it will not infrequently happen that respectable people will be found unwilling to take in a minor of such degraded social standing. The question of religion will also present difficulties. I have an apprehension that the public will resent the making over of a Hindu or Mohammadan girl to an individual however respectable of another religion. In fact I wouldn't be surprised if such a course

[1] Sir William Vincent.
[2] Secretary in the Legislative Department.

is interpreted as an attempt at conversion. I therefore think that the establishment of a Government industrial school is necessary to provide for cases of difficulty and that it should be left to the discretion of the magistrate to commit the minor to the care of the school or an individual of approved fitness. At the same time it seems to be of the utmost importance that the school should not have the appearance of a reformatory. It should be an institution with which the magistracy, the jail authorities or the police should have no concern and that it should be run entirely under the contol of the Director of Public Instruction helped with a committee composed of officials and non-officials.

I am in deep sympathy with the principles of the proposals of the Home Department, but wish to emphasise the expediency of moving with great caution.

No. 18.

LEGISLATION FOR REGULATING "BANKS AND BANKING" IN INDIA.

(25th September, 1912.)

Commerce and Industry Department, Companies A. Proceedings, September 1913, No. 56.
(Legislative Department unofficial No. 640 of 1912.)

THE proposals put forward by the administrative Department concerned do not seem to me to be an attempt at a comprehensive treatment of the subject under reference. The regulation of "Banks and Banking" is a matter full of difficulty and so largely affects the public that any but a thorough examination of its conditions in India is not likely to lead to beneficial results. As has been pointed out by Secretary,[1] if effect is given to the proposals, they will affect with undue severity many banks owned and conducted by Indians. In fact it is exceedingly doubtful whether or not they will punish the innocent more than the guilty. Nor does it appear quite clear how it will be possible to prevent the complete evasion of some of these proposals by a swindler be he a pleader or a prelate. I have very grave doubts of the utility of borrowing a few provisions from the Canadian Act or any other enactment and grafting them on the Companies Bill. There may be perhaps nothing wrong in principle in doing so, but it can hardly be regarded as a panacea for the evils pointed out in Mr. Enthoven's[2] note. I sympathise with his desire to regulate and purify "Banks and Banking" in this country, but venture to point out that the subject deserves to be treated as a separate question by itself rather than a side issue arising out of a discussion over the Companies Bill. I admit that much weight is to be attached to the views of Chambers of Commerce, but a vast number of banking firms in the country, European and Indian alike, appear to me entitled to a hearing before Government commits itself to any proposals for legislation. I may mention that the Indian commercial community might also be invited to express its views. In fact the subject appears to me to be too big to be relegated to a few sections of the Companies Bill, and is in every way deserving of being considered by itself in the form of a separate Bill. Apart from this, the Companies Bill as introduced in Council has no less than 323 sections, and if anything like a serious attempt is made to thoroughly regulate "Banks and Banking," the addition of a substantial proportion of the Canadian Act comprising 158 sections can hardly be avoided. The addition of so many more sections to the Companies Bill can scarcely be welcomed as a convenient arrangement. Moreover, the persistency with

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[1] Sir William Vincent.
[2] Secretary in the Department of Commerce and Industry.

which the public has been demanding legislation to reform Company law makes it exceedingly inexpedient to hang up the Bill for an indefinite period of time, solely because out of the discussions on that Bill the subject of the present reference has arisen. I doubt very much if the clamouring public will appreciate the ethics of blocking up urgent legislation for the consideration of a question which at best cannot be held to be more than a side issue.

No. 19 (I—III)

COMPARATIVE MERITS OF THE LEGAL ATTAINMENTS OF BARRISTERS AND VAKILS.

I.

(21st December, 1912.)

Home Department Judicial A., Proceedings, July 1913, Nos. 201—221.
(Legislative Department unofficial No. 733 of 1912.)

MUCH has been said in the notes on this file on the comparative merits of the legal attainments of the two branches of the profession. It has been assumed that barristers who are members of the senior branch are less efficient than the vakils and attorneys. Probably the assumption is based on the ground that the latter have to pass far stiffer examinations than the former. This is in fact true so far as mere book learning and cramming go; and if one were to pick out haphazard from among a group of recently called barristers and also from a similar group of vakils and attorneys newly admitted to the profession, the barrister would have to yield to the vakil in the matter of detailed knowledge of such branches of the law as are administered in Indian courts, but there are other requisites bearing upon efficiency and dignity of the profession in which, taken not only class for class but as man for man, the barrister will, I make bold to say, hold the field. Grasp of principles, breadth of view, mental expansiveness and elevation of character are necessarily more pronounced in the class that has been trained in the inspiring atmosphere of the Inns of Court in England. These attributes are assets incomparably of higher value than the mastery of the mere knowledge of Indian enactments. This is demonstrated by the fact that although the number of barristers in India is infinitesimally smaller than that of vakils and attorneys, the members of the English Bar practising in India, whether they may be European or Asiatic by nationality, are the leaders of the profession in all important courts in this country not only by virtue of their rank but by prestige, respect and the volume of practice that goes through their hands. The keenest competition is the normal condition of life in this intellectual and exacting profession and if the results of that competition almost uniformly point to the superiority of the barrister-class in India, it is a violent assumption that that class is less able or worse grounded than the other. As a class, the barristers in India have contributed to the maintenance of the purity of the profession more than any other. I should, therefore, look upon any attempt to unduly narrow down their admission to the legal profession in India with much concern if not positive alarm. Some of the suggestions in the note, if carried out, will almost stamp out the English barrister of Asiatic descent from the country. I can imagine nothing

more deplorable in the judicial administration of India than such a retrograde development. The legal profession affords a fair field of intellectual activity in which favour has no place. I believe in keeping the gate to this field wide open as heretofore and am not prepared to agree to any undue restrictions on the coming in of fresh recruits. If the subject is treated from the point of view of education alone I am ready to accept that a student before he is called to the Bar should be a graduate of any of the Indian or British Universities. In giving my consent to this condition I am not influenced by any of the considerations of the ultimate success or failure in the profession but by the consideration that University education is a valuable equipment and does not involve very close and severe restrictions. I do not feel disposed to go any further as I am fully aware of the futility of reading in Chambers in England for a year or two. In most cases it will be prohibitively costly with no corresponding gain in substantial preparation for the profession. As regards a compulsory degree in Indian law, I am equally opposed to it, as there is sufficient reason to rely on option. I am altogether averse to creating in England or in India conditions of preferential treatment between barristers, whether of one race or another.

II.

(14th March, 1913.)

PARAGRAPH (2) of the draft despatch does not to my mind present a fair comparison of the merits and attainments of the two branches of the legal profession. The Vakil has to pass a stiffer examination in the sense that he has to master more codified law than the barrister has to, but that can be no ground for holding that the former goes through "a better test of a sound legal training." The word "training" is particularly inappropriate as it is exactly in that where the barrister has the advantage over the Vakil. Again the words "the general level .... the barrister" do not at all represent the real conditions of practice at the bar. I have dealt with this in my last note.

Paragraph (6) raises the question of the preferential treatment of the non-Indian barrister. This is dangerous ground and is likely to lead to much dissatisfaction, as the distinction will be invidious and the more undesirable as it rests on racial basis.

I am unable to accept the draft despatch if these two points that I have dealt with are not re-considered and the draft modified accordingly.

III.

(15th July, 1913.)

I FEEL some difficulty in interpreting the concluding portion of the second sentence of paragraph 6 of this despatch. The words

"We are inclined to urge that the requirement of university degree from Indian students seeking *admission* to an Inn of Court" would seem to give the meaning that an Indian student studying at Oxford or Cambridge, for instance, and not having taken any degree anywhere else cannot, during his stay at the university, be admitted to an Inn of Court. The present practice is to keep the terms at the Inns of Court concurrently with the terms at the Universities. This saves much time and is quite sound, but if, what appears to me to be the meaning of the words quoted above, an Indian student will have to remain in England for three years after he has taken his degree at a university simply to eat his dinners at an Inn of Court to complete the 12 terms he must keep before his call. The restriction will be right and proper if it is imposed on the call and not on the admission. It seems to me that this matter wants further examination. I regret that this view of the question did not strike me when the draft came to me for approval, nor do I remember to have given it any consideration before to-day. I shall feel more easy in my mind if I am given an opportunity of signing the despatch after this point has been further examined.

No. 20.

PROPOSED AMENDMENT OF SECTION 511 OF THE INDIAN PENAL CODE SO AS TO PENALISE ALL ATTEMPTS TO COMMIT OFFENCES AGAINST THE LAW.

(21st December, 1912.)

Home Department Judicial, Proceedings, Deposit, June 1913, No. 12.

(Legislative Department unofficial No. 775 of 1912.)

THE Indian Penal Code restricts the application of Section 511 to offences known to it, but the amendment seeks to impose punishment in relation to all offences covered by any past or future enactments whether or not the framers thereof did or did not intend to punish attempts at committing them. I am not at all satisfied that in a country like India whose law is principally a child of enactments and codes an indefinite enlargement of the scope of Section 511 is quite safe. I doubt if it is correct to say that for the protection of society it is necessary that in every case of an offence the attempt to commit it must also be punishable. Under certain circumstances rash driving is an offence, but can it be said that an attempt to do so must also be penalised ? It appears to me that the proposed amendment will be an instance of over legislation. The straightforward course is to make specific amendments to provide for the punishment of attempts wherever such a course may be deemed expedient. I find from the notes on the connected file dealing with the proposal to amend the Indian Arms Act that any such legislation in the case of the Arms Act will be controversial. It seems to me that the proposed amendment of the Indian Penal Code will raise more intense controversy than is anticipated. I regret I am unable to give my consent to the proposed measure.

No. 21.

DIFFERENCE BETWEEN THE ENGLISH AND THE INDIAN LAW OF CONSPIRACY.

(14th January, 1913.)

Legislative Department A., Proceedings, April 1913, Nos. 352—366.

THE distinction between the English and Indian law of conspiracy has been clearly shown in the above notes. For the proper appreciation of the law of conspiracy, there are some of its constituents that must be kept in view. Firstly, there must be an agreement or association between two or more persons; secondly, the object of this agreement or association, and thirdly, the overt act or illegal omission to carry out that object. The point regarding association is common to both the laws—English and Indian. As regards the object under the Indian law, it has to be an offence, whether those mentioned in Section 121-A. of the Indian Penal Code or any other offence under the ordinary criminal law of the country. The English law of conspiracy, on the other hand includes even a lawful object if the means employed for its accomplishment are unlawful. As to the matter of the overt act or illegal omission, the Indian law divides itself off into two parts, namely, cases where to constitute the offence of conspiracy an overt act or illegal omission is not necessary, and cases where it is. Of the first kind is the conspiracy where there is agreement or association between two or more persons to commit any of the offences described in Section 121-A. of the Indian Penal Code. It will be sufficient for a conviction if the two elements of association and any of the particular objects set out in that section are established. In all other cases of conspiracy in India the third element, namely, the overt act or illegal omission in pursuance of the objects of the conspiracy must also be established to constitute an offence. The English law is far more general, as the offence under that law is completed if the association to commit an unlawful act or even a lawful act by unlawful means is proved. The English law does not wait for the overt act or illegal omission as, in most cases, the Indian law does.

In the present circumstances of India I agree with the view that the Indian law must be wheeled into line with the English law. Waging war against His Majesty, depriving the Sovereign of his rights in British India or any part thereof, or to overawe the Government of India or any Local Government by criminal force or show of criminal force are offences in regard to which mere agreement or association is sufficient. These unfortunately do not exhaust the list of the nefarious objects that seem to have occupied the minds of those that are endeavouring to make administration impossible. There seems to be no reason why anarchists who agree or associate with each other to assassinate an official or a non-official should be allowed to go on enlarging their assemblies without let or hindrance

so long as an overt act or illegal omission has not been committed by them or any one of them in pursuance of their designs. So far as this goes, in my opinion the time has come when we must rely on the precedent of the English law and take up legislation accordingly, but I doubt very much if it is necessary to go so far as to graft that law on the Indian law in its entirety. I agree with Deputy Secretary[1] in the view that in cases of conspiracy to commit an act which is not an offence, the condition of the overt act or illegal omission must be imposed. The draft put up by him forms a good basis for discussion but will have to be recast after the policy is settled.

Secretary[2] has expressed some apprehension whether the proposed change in the law would not go beyond the necessities of the present case and suggested the directions in which the Indian law of conspiracy may be modified. I do not share his apprehensions and support the more comprehensive changes dealt with above.

My Hon'ble Collegue the Home Member[3] has raised the question of the immunity from penalty of informers. No penalty would attach if the informant himself is not a member of the conspiracy. If he be, I agree with Deputy Secretary[1] that the existing law is sufficient to give him protection.

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[1] Mr. A. P. Muddiman.
[2] Sir William Vincent.
[3] Sir Reginald Craddock.

No. 22.

IRREGULARITY OF ELECTING AN OFFICIAL AS AN ADDITIONAL MEMBER OF THE LEGISLATIVE COUNCIL.

(6th February, 1913.)

Legislative Department A., Proceedings, June 1913, Nos. 17—24.

SARDAR DALJIT SINGH[1] was at the time of his election in the employ of Government and was in receipt of remuneration for the services rendered by him. It is pointed out that his emoluments were drawn from the fees paid for the registration of documents that were presented before him for that purpose. Obviously these fees are collected by Government and credited to it, there being an understanding that the Sardar was to get a certain percentage of such collections. I cannot, therefore, see how it can be urged that the remuneration given to him is anything other than payment by Government for services rendered by him. This, to my mind, clearly brings him in the civil employment of the Crown. Under the circumstances, I am unable to hold any other view than that the Sardar was an official at the time he was nominated for election. This was irregular and against the provisions of the Regulations. In my opinion, therefore, his election is void. If this view is correct, a second election, will have to be held.

[1] Then Member of the Imperial Legislative Council.

No. 23.

PROTECTION OF COURTS AND JUDICIAL OFFICERS FROM SLANDEROUS ATTACKS, AND THEIR PROCEEDINGS FROM IMPROPER COMMENTS WHILE CASES ARE *SUB-JUDICE*.

(22nd April, 1913.)

Home Department Judicial A., Proceedings, November 1913, Nos. 82—94.
(Legislative Department unofficial No. 769 of 1912.)

1. THE MADRAS proposals are unacceptable, firstly on the ground of the doubt attaching to any legislation that may confer on Chief Courts the same powers to punish contempts as have been held to be existing inherently in the Chartered High Courts, and secondly, on the obvious ground that the exercise of such powers may not be as frequent as the requirements of good Government in a given province may demand. On a careful consideration of the balance of advantage between the Madras proposals and the provisions contained in the draft Bill, I am decidedly of opinion that we should adhere to the principle of legislation affirmed in the Council Order of the 16th of December 1910. As has been pointed out by Secretary,[1] the summary powers of the Madras High Court, assuming that their recent decision is sound, will remain unaffected by the proposed legislation.

2. The protection the Bill is intended to secure, should, in my opinion, undoubtedly be extended to all courts of justice, be they civil, criminal or revenue. Apart from the anomaly[2] pointed out by Secretary[2] in paragraph 5 of his note, I have known cases tried by revenue courts that have been criticised in the press in so unfair and defamatory a manner that the comments might well have been treated as contempt. On principle, therefore there seems to be no difference between the three different courts so far as the matter of protection is concerned. Similarly, I am all for retaining sub-clause 228 (*b*) of the Bill which covers proceedings before Commissioners. It is true that cases of contempt with regard to these are not likely to be of any great frequence, but I can imagine cases where, in the present conditions of the country, grave difficulties may arise for want of such a provision as the sub-clause contains.

3. The intention is to punish criticism that is *mala fide* and unfair to the knowledge of the critic. In fact it is the element of malice prompting a deliberate mis-statement that is intended to penalize.

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[1] Sir William Vincent.

[2] Case where the Advocate General of Bengal was taking proceedings in the High Court, Calcutta for contempt of Court in regard to proceedings in a criminal case pending at Barisal.

The word " inaccurate" in sub-clause 228-B. (*a*) on the other hand is wide enough to cover cases of *bonâ fide* omission or mistake which no one wants to punish. It will therefore be desirable to omit it. Secretary[1] suggests the substitution of the word " misleading " which will be a considerable improvement on the original draft. It is possible to find even a better and more definite word than this, but I must confess that I am unable to suggest any at present.

4. As regards proceedings *sub judice*, I strongly hold to the view that they should be treated as absolutely sacrosanct and that they should not be subject to any criticism honest or otherwise so long as they have not terminated. To allow a loophole based on the honesty of the criticism is to open the door to much mischievous comment that may not amount to actual contempt.

5. I cannot subscribe to the view that comments on the legality of the proceedings or the orders passed on any such proceeding should be penalized. If the comments are fair and *bonâ fide*, there seems to be no reason why they should not be allowed with regard to such proceedings within the same limits as in the case of any other.

6. As I have said before, the substitution of the word " misleading " for the word " inaccurate " is a great improvement, but I am disposed to retain Explanation 2 of Section 228-B., at least for a time. Should the Bill ever go before the country, the retention of the explanation will serve the purpose of assuring the general public that there is no intention to punish correct and fair reporting. Its deletion will probably follow at the committee stage, but till then it might as well be retained.

7. The Bombay Government proposal as regards the onus is entirely unacceptable. No good reason has been shown why the ordinary rules as regards the onus of proof in criminal proceedings should be departed from. It will, moreover, draw bitter and hostile comment from all quarters. I think we should drop it altogether.

8. I trust that the necessity to introduce this Bill in Council will not arise. But should it do so, may I express the hope that it will not be treated as an emergent measure and that it will be sent out to the country for opinion before introduction ?

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[1] Sir William Vincent.

No. 24.

ESTABLISHMENT OF A HIGH COURT FOR BIHAR AND ORISSA.

(23rd May, 1913.)

Home Department Judicial A., June 1913, Nos. 310—311.
(Legislative Department unofficial No. 234 of 1913.)

It is evident that the Calcutta High Court is now prepared to accept the inevitable, but, as a last chance of escape from partition, has thrown in suggestions that may involve the rejection of the entire scheme on financial grounds. We need not fall into the trap that has been so carefully laid.

The first and foremost question is whether we should have a separate High Court at Patna. There seems to be unanimity on this point so far as the Government of India is concerned, and it appears from certain answers given in the House of Commons that there is a disposition in its favour at the India Office also. It is time, therefore, to move the Secretary of State for the grant of the Letters Patent by His Majesty.

The new High Court does not want an Original Side. The model of the Allahabad Court will be sufficient as it will reserve the extraordinary Civil and Criminal original jurisdiction. It will be sufficient to start the Court at Patna with seven Judges. If we take from the Calcutta Court we shall have to appoint two more which is a very different matter from the ambitious and extravagant programme foreshadowed in the High Court letter. I consider the residuary strength of that Court at fourteen Judges quite ample.

I do not at all like the suggestion that the new Court should start with five Judges. I would leave only part-heard Bihar and Orissa cases to be disposed of at Calcutta and the rest should be, in my opinion, transferred to the new Court. Difficulties of translation can be easily got over as the paper books that are already in the translation department may be completed at Calcutta and then forwarded to Patna. There is not much force in the observation as regards the fees that are paid to counsel and pleaders. It is very well known that money does not pass before the cases are actually on the list which is not very long before the actual hearing. I regard these suggestions of the Calcutta High Court as deeply interested as it is only on their acceptance that the present number of nineteen Judges can be maintained for years to come even after the partition is effected. There seems to be a lingering hope in the mind of their Lordships that even after the partition, if their present strength is maintained, some political change of fortune might bring about restoration. We should not let the partition be done in a half-hearted way. The transfer of cases will not perhaps

necessitate legislation in England as Section 2 of the Indian High Courts Act of 1911 makes it lawful for His Majesty to make such "incidental, consequential, and supplemental provisions as may appear to be necessary by reason of the alteration" of the limits of the local jurisdiction of a High Court. It is possible, therefore, to insert the provisions as regards the transfer of the cases in the Letters Patent but should there be any doubt, the Law Officers of the Crown at the India Office will no doubt advise legislation which can be obtained without much delay. In any event, it will be prudent to draw their attention to this point when we ask the Secretary of State to apply for the Letters Patent.

Orissa is too small to be given either a Judicial Commissioner or a bench of two Judges. The circuit device is for many reasons undesirable but the most weighty objection is that of the cost of it. With improved communication, Orissa will not be worse off than it is at present. We have to remember that the financial aspect must be very carefully considered or the India Office may wreck the whole scheme.

I find from the notes that the idea is to start the new Court three years and a half from now. It seems to me that we must do all we can to do it before His Excellency the Viceroy lays down the reins of his exalted office. If an effort is made, there is no reason why the building at Bankipur should not be completed in time for the Viceroy to open the new High Court early in November 1915.

No. 25.

INTERPRETATION OF RULE 26 OF THE RULES OF BUSINESS.

(15th August, 1913.)

Legislative Department A., Proceedings, October 1914, Nos. 2—11.

THE principle underyling Rule 26 is that all proposals for legislation in the Governor General's Council must be reported to the Secretary of State and that no Bill containing the proposed legislation should be introduced without his having had an opportunity of expressing his views on the same to the Government of India. Part (2) of the rule deals with exceptions and sets them out in its sub-clauses (*a*), (*b*) and (*c*).

One can see at a glance that (*a*) has no application to the present case. As regards (*c*), it can hardly be urged that any delay in the present instance would involve "serious evil". The smuggling against which it is intended to proceed, is no doubt an evil, but the qualifying word "serious" denotes some gravity of a striking character. This, I do not think, can be said to exist in the present case, and to apply exception (*c*) to it would be a manifest straining of the rule. Exception (*b*) is somewhat more difficult to construe. It lays down an exemption in favour of Bills that are in the opinion of the Government of India of a "purely formal or unimportant character". It is a question of fact whether or not a Bill is of such a description. The responsibility for deciding the issue of fact is placed on His Excellency's Government. The question of importance is a relative one and may be of varying degrees, but it is quite evident that among various tests one may be to find out whether the Bill is such as is likely to draw much attention, elicit criticism and provoke controversy. Judging from the nature of the proposed amendments, they appear to be formal, but one cannot overlook the fact that originally it was not contemplated to treat them as falling under any exceptions. It was only when the hope of obtaining the Secretary of State's views before the September session became faint that the exception in question was thought of. I am not at all sure that the Bill will altogether escape the critical attention of the non-official members in its passage through Council. Should it not do so, a position of some embarrassment will be created giving the Secretary of State ground to question the soundness of our discretion in having proceeded with the legislation without any previous reference to him. If we wish to avoid any such risk, it will be safer not to rely on exception (*b*) which is of doubtful application to the case under notice.

No. 26.

AFFILIATION FORMALITY IN REGARD TO A COLLEGE MAINTAINED BY A UNIVERSITY.

(18th September, 1913.)

Education A., Proceedings, October 1915, Nos. 33—47.
(Legislative Department unofficial No. 385 of 1913.)

As to the first point, it is purely a question of fact whether or not a professor appointed is a University Professor. If he is, the appointment is subject to the sanction of the Government of India. It appears to me that if a College of Science is created with the donation given by Dr. Ghose, the professors appointed to that particular College will be officers holding a position altogether distinct from that of University Professors. This is a view that receives support from the precedent of the Law College at Calcutta. In respect of such appointments, therefore, sanction of the Government of India does not seem to be necessary.

2. As regards the question whether a college maintained by the University need go through the formality of affiliation, it may well be urged that the mere fact of the maintenance of such an institution by the University obviates the necessity of such a formality. The University confers affiliation on outside colleges after satisfying itself of their fitness. It is, therefore, a reasonable presumption that when it maintains a college of its own it does so with the full responsibility of maintaining the right standard of efficiency. If this is correct, the formality of affiliation will obviously be a superfluity. Probably this is the reason why the term "affiliated college" in Section 2 (*a*) includes such institutions.

3. Secretary[1] has raised an interesting point in paragraph 4 of his note. The language of Section 3 of the Act is wide and is intended to confer on the University extensive powers for the advancement of learning and education. It would, I think, be repugnant to the sense of that section if it were held that the University was disqualified from receiving donations to endow the creation and maintenance of collegiate institutions.

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[1] Sir William Vincent.

No. 27.

POSITION OF AN OFFICIAL MEMBER OF THE LEGISLATIVE COUNCIL AS REGARDS SIGNING REPORTS OF SELECT COMMITTEES.

(*15th February, 1914.*)

Legislative Department A., Proceedings, April 1914, Nos. 85—124.

THE question of policy rests with the Government of India and the deletion of the clause under notice is based on a decision by that body. My Hon'ble Colleague[1] who principally represents the Government in the Select Committee, made it quite clear what the attitude taken by us towards this clause was. Mr. Kenrick expressed his views in complete disagreement with the Hon'ble Member[1] in charge of the Bill. He, however, realized in time the delicacy of his position as an official member and refrained from voting. I do not see what else he could do after what he has said in supporting Sir I. Rahimtoola.[2] Now he comes up asking for his views that are not in harmony with Government decision to be placed in the Select Committee Report. It does not seem to be possible to do so without proclaiming to the world that this official member does not only withhold his vote from Government but expressly deprecates Government decision. Whatever might have been the state of affairs in the old days, I am perfectly certain that the freedom of official members to vote as they please or to give them the right of recording their dissent as desired by Mr. Kenrick, will be a dangerous course for Government to tolerate in the reformed Council. The suggestion that Mr. Kenrick may not sign the report is equally futile, for such an attitude as this will be, perhaps, a greater subject of comment than his signing a minute of dissent. There can be no objection to his asking us to place his views on a confidential file, but to withhold his signature from the Report is to publish his standing out against Government.

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[1] Sir William H. Clark.

[2] Then Member of the Imperial Legislative Council.

No. 28 (I & II).

RESOLUTIONS BY NON-OFFICIAL MEMBERS OF THE LEGISLATIVE COUNCIL ON ADMINISTRATION MATTERS.

I.

(15th February, 1914.)

Legislative Department A., Proceedings, March 1914, Nos. 44-45.

THE resolution may be ruled out as one, the discussion of which is inconsistent with public interest, but it cannot, as it appears to me, be thrown out on any other ground. It asks for the appointment of a Committee for the investigation of certain matters. If it limits the selection of the members of the proposed Committee to form among those only who are members of the Legislative Council, no difference of principle arises. It may savour of a Committee of the House of Commons, but in reality it can have no such character, as the Council unlike Parliament, is not the ultimate repository of executive function. The real test of the admissibility of a resolution of this kind is in determining whether in giving effect to the recommendation it makes legislation barred by Section 22 of the Indian Councils Act of 1861 necessary. No such action is needed in case Government decides to appoint the proposed Committee.

II.

(21st February, 1914.)

THE NOTE recorded by my Hon'ble Colleague Sir William Meyer[1] has received my very careful attention. There is a great deal in that note with which I am in agreement. I quite realise that there is a combined effort on the part of the non-official Members to steadily press for taking part in the executive administration of the country. So far as this goes, it is our duty to resist it to the utmost of our power, as an encroachment like this must necessarily be held to be unconstitutional, for it is an undisguised attempt to trench upon the authority of the Governor General in Council as provided for in the Government of India Acts. I have, however, a shrewd suspicion that the form given to the resolutions proposed by non-official Members has been designed to meet the constitutional objection. They do not, therefore, ask for any non-official Members to be associated in any manner with the executive control of the Government of India, but content themselves with praying for the appointment of a Committee to inquire and report on a particular matter within the competence of the Government of

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[1] Member for the Finance Department.

India to deal with as the chief executive and administrative authority in the country. It is true that in the appointment of such a Committee the resolutions mostly limit the selection of Members from among the Members of the Legislative Council itself. This limitation no doubt gives the complexion to which Sir William Meyer[1] has adverted and an analogy to a Committee of the House of Commons is established. The question then is whether this resemblance by itself is sufficient to characterise these resolutions as unconstitutional. I have very grave doubts that it is so. (The Committee of the House receives a delegated authority from the House of Commons itself and as such, constitutionally speaking, differs in character from a Committee suggested in these resolutions.) A Committee appointed by the Government of India cannot be held to be a Committee of the Legislative Council, as for instance, Select Committees to report on Bills are. In giving effect to these resolutions the Legislative Council has no hand, as it rests with Government of India to accept or reject its recommendation. In the event of acceptance and the formation of such a Committee, though it be entirely composed of Members of the Legislative Council, that Council does not and cannot claim to have any authority over or relation with it as Parliament has with reference to its own Committees. It cannot be questioned that the Governor General in Council has by executive order power to appoint a Committee of such men as he likes. The mere fact that he appoints a Committee entirely composed of the Members of the Legislative Council does not affect the issue. The qualification of Membership is only descriptive and does not place such Committee in subordination to the Legislative Council. It would appear, therefore, that the resemblance to a Committee of the House of Commons is somewhat deceptive and far less real than it seems on the surface. But it may be urged that the distinction is too fine to be noticed by the people and that an impression may be created that the Legislative Council of the Governor General has come to have a share in the executive administration of the country, and that this impression, however erroneous, may prove to be mischievous. This I am prepared to admit and consider sufficient for ruling such resolutions out on the ground that they are inconsistent with public interest.

2. There is one point in the note of my Hon'ble Colleague[2] to which I would respectfully beg to make reference. In paragraph 3 of his note he holds that the resolution is unconstitutional, as, in his opinion, His Excellency the Viceroy wields the prerogative of the Crown in India and that the moving of a resolution like this would be an infringement of that prerogative. With great submission, the analogy of a Member of Parliament moving for the appointment of a Royal Commission is not complete, but even if it were, I may be allowed to mention that more than one eminent law

[1] Member for the Finance Department.
[2] Sir William Meyer.

officer in this Department has questioned the proposition as regards the vesting of the prerogative alluded to by the Hon'ble the Finance Member.[1] Perhaps it will not be out of place to say that there are precedents in favour of similar resolutions going so far back as 1891.

3. Though I am unable to agree with my Hon'ble Colleague[1] on the constitutional point, I agree with him in thinking that the resolution is an undesirable one and that its discussion in Council is likely to prove mischievous. This, however, may justify its rejection in the public interest, but should not be allowed to betray us into a ruling which may place unnecessary restrictions on the privileges granted to non-officials by the Councils Act of 1909.

[1] Sir William Meyer.

No. 29 (I—III).

ADMINISTRATION OF RELIGIOUS AND CHARITABLE ENDOWMENTS IN INDIA.

I.

(10th June, 1914.)

Home Department Judicial A., Proceedings, July 1914, Nos. 265—287.
(Legislative Department unofficial No. 3 of 1914.)

The trend of the discussion at the Conference is clearly in favour of Government taking some action to put the administration of these trusts on a satisfactory basis. My Hon'ble Colleague the Home Member[1], I am glad to find, is disposed to consider this favourably, but is not prepared to place any great responsibility on the executive Government for the carrying out of this reform. His proposal in the main is to give greater facility to beneficiaries to seek the protection of the District Judge against a dishonest trustee.

While fully appreciating the measures of relief his proposals imply, I do not believe they will insure any real and effective reform. The plaintiff in a suit for ejecting a trustee has an uphill fight and it is common knowledge that under the existing conditions litigation of this kind is prompted by private motives rather than public spiritedness. The suggestion that he may now be allowed to move the District Judge on a petition bearing an eight-anna stamp for the production of accounts is good in its own way, but does not improve his position except in so far that he may so move the court before the institution of a suit, which he cannot do at present. It will also be a relief to him, no doubt, if he has to pay only Rs. 10 instead of an *ad valorem* court fee. The proposed security to reimburse the cost of litigation to a *bonâ fide* plaintiff from the trust property or the defendant trustee is also a step in advance. Apart from matters of detail, these three are the principal changes that are put forward for consideration to make the lot of a plaintiff less hard than it is in suits of this kind at present. I welcome these suggestions for what they are worth, but as I have said before, I do not think they are by any means sufficient to check the wholesale maladministration of endowments that is rampant in the country. We must not forget that the technically legal cost of a suit is almost nothing in comparison with the enormous expenses that a plaintiff has to undergo in prosecuting his case. The defendant in such cases is far better placed, as he has the resources of the trust at his disposal to engage the best legal talent available to contest the suit.

The provision as regards the appointment of the Receiver of the trust property pending the decision of the case is of exceptional

[1] Sir Reginald Craddock.

application, and only after the court has reached a stage of the trial at which it is satisfied that a *primâ facie* case of waste or misappropriation has been made out. The real difficulty, as I understand, is one of principle. If the civil court and civil court alone is to be the agency through which the aggrieved public is to bring dishonest trustees to book, my conviction is the evil will flourish very much the same as now. To shirk all executive responsibility in a matter of this kind amounts to a disregard of the obligation of a civilized Government to put down the commission of breach of trust in whatever form or shape it may be. The fact that the funds in question are for charitable or religious purposes of a public character, does not, in any way, lessen this obligation. Unless and until a trustee is legally bound to keep and publish accurate accounts, no proceedings, miscellaneous or otherwise, before the District Judge, will be of any real efficacy to bring about the general reform for which the considered opinion of thoughtful Indians, both Hindus and Muhammadans, has cried in vain during the last three decades. To my mind this is the crux of the whole question, and I entirely agree with the principles embodied in clauses 3, 4 and 5 of the rough draft of a Bill Sir William Vincent[1] has put on the file for an easy comprehension of the views he holds. The maintenance, publication, and audit of the accounts of all religious or charitable trust properties is the very essence of the reform. Every trustee should be made to feel that in the daily management of the trust he is under statutory obligation to be straightforward and honest in his dealings, and that any departure from this course will expose him to immediate and prompt detection. Action in the civil court as proposed by the Hon'ble the Home Member[2] cannot secure this. On the contrary, the cumbrous and protracted proceedings of that court will give immunity to a dishonest trustee to play ducks and drakes with trust properties for years together before he is removed.

The question of the registration of trusts with a copy of the trust deed or of specification of the object of a trust is, to my mind, of considerable importance. In fact the utility of the maintenance, publication, and audit of the accounts largely depends upon the definite ascertainment of the character and scope of these trusts. It is possible that registration alone might not be effective; and it may also be the case that all provinces are not sufficiently advanced to justify the enforcing of such registration. I think, however, that it would be advisable to insert in the Bill a clause authorising Local Governments to direct by notification that in respect of all these trusts in a Province, or in a particular area, or of any particular trust or class of trusts, a record should be prepared by an authority appointed in this behalf in such manner as may be prescribed, of the actual trust property and the purposes for which it was held in trust. It should also be provided for that a record

[1] Secretary in the Legislative Department.
[2] Sir Reginald Craddock.

like this be presumed to be correct in all subsequent proceeding until the contrary is proved. The cost of preparing this record would be met from the trust property or in such other manner as might be prescribed. Interested parties should have the right to inspect the record, the publication of which might be carried out in such manner as might be thought desirable. Upon such publication, the provisions of clauses 4 (*b*) and (6) (1) of the draft Bill in so far as it refers to clause 4 (*b*) would cease to be operative.

If this addition were made, the Bill would be more effective in checking the existing abuses and the public would have ready source of information as to trust properties and the purposes of the trust. This proposal has the merit of reducing the interference of any executive authority to a minimum, and the record would, in any case, only be presumptive evidence of the facts therein stated. Moreover, it would be possible for the Local Government to try the effect of having such a record prepared in small areas or in individual trusts without creating any general misgiving or excitement. I would further suggest that in such cases, the Local Government should move either *suo motu* or on the application of any person interested. Subject to these remarks, I approve of the draft Bill generally, but there are details which will require further examination and which will have to be settled later. It will be useless to discuss these details till the general principles are approved.

I see no difficulty in the way of taking up legislation in the Imperial Council. A great deal can be left in the hands of Local Governments to frame rules to meet local conditions and requirements for the purposes of carrying out the provisions of the proposed law.

II.

(*29th June, 1914.*)

THE views I have expressed in my note of the 10th June, 1914 remain unaffected. I am strongly in favour of a comprehensive legislation taken up in the Imperial Council with the effective safeguard of applying the provisions of the proposed law to the provinces by notification. In a matter like this, so far as the principles go, there can be no varying local conditions. To prevent misappropriation and mis-application of trust funds would seem to require a common remedy, but the question of applying it to a given province may be a matter of expediency which can be determined before a notification is issued.

In supporting the reference from Bombay and Madras to let them proceed with their Bills, I gave my consent only as a *pis aller*. I should do the same now should the Council disagree with me in regard to Imperial legislation which I advocate.

III.

(20th July, 1914.)

THE despatch represents what was decided in Council though it does not contain the views that I hold on this important question. I have refrained from dissenting as it has been accepted that Local Governments should be directed by executive instructions to invite the opinion of all responsible sections of the people to say whether greater control of trust properties and their management was or was not desirable. I am content with this as I have every hope that an enquiry of this kind will prove that the suggestions made by Sir William Vincent[1] and myself were not such as would not have been acceptable to the people.

There is an apparent flaw in the proposal that the Civil Courts should be empowered to enforce the production of accounts and other connected papers and title deeds inasmuch as it is presumed that every trustee is bound to keep them, but in fact there is no statutory obligation, as distinguished from such an obligation as arises from the general principle of law governing trustees, on the part of a trustee to do so. The Courts may be met with the reply from a trustee that he keeps no accounts or other papers. There the function of the Court in the proceeding before it will end and unless and until there is a regular suit instituted, the trustee will remain immune from any interference. It is also a question not free from doubt whether a trustee can be removed for the mere fact that he keeps no accounts and without any specific proof of dishonesty on his part. I am afraid that in practice the new procedure will probably not prove as effective as is anticipated.

The form of the proposed legislation and the place it should have on our Statute Book will be considered later. This is a matter pre-eminently for this Department to decide.

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[1] Secretary in the Legislative Department.

No. 30.

COUNCIL OF INDIA BILL.

(Reorganization of the Secretary of State's Council.)

(25th June, 1914.)

Home Department Public A., Proceedings, August 1914, No. 20. (Legislative Department unofficial No. 320 of 1914.)

THE BILL is primarily intended to provide for the simplification of the business procedure of the Secretary of State's Council, and to admit in the selection of the two Indian Members a certain degree of the popular element.

As regards the first, the desire to simplify the procedure is not perhaps without some justification. Under the Act of 1858 all matters however trivial or of routine must be decided by the majority of votes at a meeting of the Council, and where the Secretary of State is permitted to act independently, he is bound to table his orders for a week before issue except such as may be urgent or secret. It also directs the examination of all matters by committees before submission to the Council. The statutory direction to hold Council meetings at least once a week is only a corollary to these provisions. The stringency with which the powers of the Secretary of State in relation to his Council have been hedged in may have been dictated by considerations that were probably strong in 1858. The assumption of the administration of India by the Crown had induced a spirit of close scrutiny which, in the absence of direct control by Parliament, imposed almost indiscriminate check on the powers of the Secretary of State by associating with him a Council though largely advisory in character. Moreover, the administration of the country in the fifties was carried on on far simpler lines than now, and the number of despatches to and from India could not have been anything like what is the case at present. Lord Crewe obviously feels that the machinery provided for 1858 is unworkable for the present-day requirements and is out of date. How far this is the case, it is not for me to say, as I do not pretend to have any intimate acquaintance with the working of the India Office, but my connection with the Government of India in the last three years and a half leaves me under the unmistakable impression that despatch of business is not the strong point of that office. But if it be conceded that some sort of simplification has become a necessity, the Bill would seem to secure that. So far as this goes, there will hardly be a difference of opinion, but some of the critics of the Bill betray nervous alarm at its provisions going to dangerous lengths in aiming at simplicity. Clause 2 of the Bill deals with the contemplated changes in procedure, and on a careful examination of these it is possible to arrive at the conclusion as to whether or not the proposed legislation has embarked on a hazardous course. It will also show in what sense, if any, the Government of India will be affected by its

provisions. The proposed changes are under different heads and may be considered as follows :—

Sub-clauses (1) and (5) may be taken together.—They provide for delegation of the power to sign orders, communications or other documents. The delegation is to be effected by rules and orders made by the Secretary of State in Council and does not go beyond the mere question of signatures as the Bill provides that all such orders and communications must purport to be made by the Secretary of State in Council or, as the case may be, shall be as valid as if it had been signed in accordance with the provisions of the Principal Act, *i.e.*, the Government of India Act of 1858 as amended by any subsequent enactments. I do not think these clauses materially bear upon the position of the Government of India except perhaps in point of prestige, should the delegation be in favour of a member of the India Council in respect of matters covered by sub-clause (1), which alone of the two clauses under consideration concerns us. This can be safeguarded by representing to the Secretary of State that the authority to sign may be given only to Under-Secretaries or Assistant Under-Secretaries as provided for in sub-clause (5). Communications from the Government of India to the Local Governments are made under the signatures of Secretaries to Government without touching the dignity of provincial Rulers or their Governments. A similar practice adopted at the India Office does not appear to me to be open to objection. It is inconceivable that an Under-Secretary or an Assistant Secretary will put his signature to a communication that had not the approval of the Secretary of State unless it be one of routine or of a trivial character.

Sub-clauses (2) and (3).—The provisions contained in these two sub-clauses seem to have given much cause for alarm, but I do not think that it is possible to simplify the procedure of the Secretary of State's Council without giving him the authority contained in the proposals covered by them. We have to remember that the business transacted by the Secretary of State is of a multifarious character ranging from measures of the highest import to almost insignificant trivialities concerning the administration of India. It is not possible under the circumstances to introduce into the statute a detailed specification of the particular subjects in reference to which the Secretary of State in Council should be empowered to make rules and orders for the simplification of procedure, and under the circumstances it is inevitable that a great deal is to be left to his discretion. I am not prepared to admit that he will unwisely exercise this discretion. In such matters a great deal has to be taken on trust. The Memorandum attached to the Bill clearly indicates the direction in which the Secretary of State aims at simplification. I am unable to accept that his intention is to assume autocratic powers with reference to matters of gravity and importance. A perusal of sub-clause (2) shows that the intention is not to abolish the Standing Committees or paralyse his Council, but only to relieve them of the burden of dealing with such matters as do not require the consideration of these Standing Committees

or of the whole Council. Obviously he proposes to dispose of such matters in communication with and with the assistance of individual members of his Council as is plainly put in the Memorandum. No responsible Secretary of State could venture to dispense with the Standing Committees or the Council when dealing with questions of moment. The provisions of sub-clauses (2) and (3) may appear to give him a blank cheque, but it is hardly fair to him on a perusal of the Memorandum to say that he wants to get rid of the deliberate assistance of the Committees or of the Council alt gether as has unfortunately been understood in some quarters. Looked at in the light of the pledges given in the Memorandum, the provisions contained in these two sub-clauses are such as must be accepted to be indispensable if the business of the India Office is to be transacted on rational lines.

In our own Legislative Council when it is impossible to give detailed specification in a Bill we frequently take general powers with an assurance by the Members in charge of their temperate and careful use. I fail to see with what justification we can refuse the Secretary of State the same consideration. If this is remembered, the provisions of the two sub-clauses under notice will lose all their dread. Under the circumstances, I do not for a moment think that the position of the Government of India will, in any material degree, be affected if the Bill is passed into law. Nor is there any danger of a single Member of the Secretary of State's Council disposing of any matter, however trivial, without reference to the authority of his Chief. I submit that we have to treat the Bill in the spirit in which it is offered and raise no doubts or suspicions on a strict and technical interpretation of its text overlooking the policy enunciated in the Memorandum.

Sub-clause (*1*).—The reduction of the quorum is consequential on the reduction of the number of Members from fourteen to ten, and so also is the dispensing with the weekly meeting of Council in view of a large amount of unimportant business being transacted under the proposed rules. I do not see that this sub-clause affects the position of the Government of India in any way.

Sub-clause (*6*).—This extends the privilege of the Secretary of State to deal with cases of secrecy, but regard being had to the language of the sub-clause, I am disposed to think that the extension should be welcomed by us. It is difficult to dispute that " any question gravely affecting the internal tranquillity of India, or the interests of India in any other country or the peace and security of any part of His Majesty's Dominions " is one which may safely be left to the Secretary of State to say whether it should or should not go before the Council. In the present condition of India and of Asia generally, this departure on the Act of 1858 as amended is, in my opinion, a very wholesome one.

Sub-clause (*7*).—The safeguard contained in this sub-clause though not as effective as the one contained in Section 3 (*2*) of the Indian Councils Act of 1909, is ample for all practical purposes. The presentation of an address by either House of Parliament may

not, technically speaking, automatically rescind the rule or order but it is not probable that His Majesty will refuse to give the petition due and proper consideration. I regard the sub-clause as a very great protection against the Secretary of State making unreasonable rules or orders under the proposed Bill.

As to the provision relating to the selection of Indian Members from a panel composed of persons elected by the non-official members of the Legislative Councils I consider it an act of great statesmanship on the part of Lord Crewe to have incorporated it in the Bill. The object of having Indian Members on the Secretary of State's Council is to secure an expression of the Indian point of view in the deliberations of his Council. Lord Morley made a beginning in this direction by nominating two such members. Lord Crewe recognises the soundness of this policy but wants to go a step further by giving representative Indians a voice in the selection. The Bill does not give the number of men that will compose the panel, nor was it desirable that it should ; as a matter of detail it is only right and proper that it should be left to rules and regulations. There are nine provincial Legislative Councils and giving each the minimum of one, no less than nine will be returned by them, and if the Imperial Legislative Council were to return three, which is not an unduly high figure, the panel could be composed of at least twelve. Granting for the sake of argument that the full strength of the panel will remain at only twelve the range of selection by the Secretary of State will not be small. I am not disposed to think that out of so many men elected by the Councils we shall have none but the "inimical" to swell the panel. I think that between the demand of the Indian National Congress for pure election and the practice of nomination that has so far prevailed the solution offered by Lord Crewe is a compromise for which a great deal has to be said. The Secretary of State's Council is not an executive one and even after the Bill is passed will remain as largely advisory as it is now, its administrative side reaching almost vanishing point. The question then is, what objection can there be to placing on that Council by a process of careful selection men elected by constituencies that are of our own creation and on which we place some reliance for legislative purposes and also for advice by giving them power to move resolutions on questions of public interest, not to speak of our having given them the right of interpellation. The policy of giving more and more recognition to popular sentiment has been a characteristic feature of British rule in India. We have accepted by our scheme of representation in our Legislative Councils certain interests in the social and political forces of the country as entitled to a place in these Councils. In our dealings with the non-official members of these Councils we recognise that due weight is to be given to their views.

We know that as political factors they have to be reckoned with. Even if it be conceded, which I do not admit, that they do not represent the masses can it be denied that they represent at least the articulate section of the public ? In the present conditions

of India it is a truism that the two Indian Members of the Secretary of State's Council whether nominated or selected from the proposed panel, must be of the class which is educated and as a body distinct from the masses. If this be so, the balance of advantage seems to be clearly on the side of selection from the panel which, at any rate, will enjoy the confidence of that part of the public which we have uniformly recognised as entitled to place its views before us. I think that any concession, consistent with the safety and maintenance of British rule in India, made to this class is sure to strengthen rather than weaken that rule in this country. It has been urged that this class is imbued with the political creed of the Indian National Congress and that its representatives, forming the panel in question, will be men of the same sentiment. I do not think it is so, but let it for a moment be granted that it is. Let us suppose that men like the Maharaja of Burdwan, Raja Tasaduk Rasul Husain Khan, Mian Mohammad Shafi, Raja Khushalpal Singh, Maharaja Manindra C. Nandi of Kasim Bazar, Sirdar Daljit Singh, Nawab Abdul Majid, Sir Fazalbhoy Currimbhoy, Maharaja Ranjit Sinha and many others of their political complexion will not be returned to the panel. This is a violent supposition, but let it be that only strong Congress men are returned. The experiment will not be bolder than our having appointed ex-presidents of the Indian National Congress as a Member of an Executive Council or a High Court Judge. Madras and Bombay have witnessed this phenomenon and survived the shock. Surely the two Indian Members of the Secretary of State's Council, even if Congress men, will not hold a more responsible position. I do not, however, anticipate that the majority of the proposed panel will be mandatories of the Congress. I believe we shall have more than a fair proportion of men who hold moderate views and have a firm faith in the blessings of British rule in this country. The more I reflect on this part of the Bill the more I feel that it embodies a perfectly safe and legitimate concession to popular demand.

There is nothing in the action taken by the Secretary of State to which any legal objection can be taken. He is well within his right to introduce the Bill, but I agree with my Hon'ble Colleague, the Home Member, that though not bound to consult us before the introduction, His Lordship would have done better, if he had, at least as a matter of courtesy. I do not, however, think that it will serve any purpose to enter a protest against his not having done so. The strictly legal rights are all on his side, and I have grave apprehension of our receiving a rebuff if not a rebuke. I think the safer and the more useful course will be for us to request the Secretary of State to take us into his full confidence when the time comes to frame the rules under the Bill should it ever pass into law which, in the present temper of the House of Lords, I very much doubt.

No. 31.

PROHIBITION OF OBJECTIONABLE ARTICLES IN NEWSPAPERS.

(25th August, 1914.)

I AM also of opinion that the provisions of Section 144 of the Criminal Procedure Code do not apply to this case. It will be very difficult to make out a case under that section on the material before us. The offending article is exceedingly objectionable, but that alone is not sufficient. If there is any action to be taken it must be under the Press Act for I consider that will be far more satisfactory than proceeding even under Section 108 of the Code. I am disposed to think that a judicious use of the Press Act at the present juncture will be more helpful than taking up of fresh legislation. We have got to keep things quiet and in whatever we do, regard should be had to the avoiding of illegalities and such action as may unnecessarily draw public attention and provoke excitement.

Home Department Political A. Proceedings, January 1915, Nos. 180—182.
(Legislative Department unofficial No. 513 of 1914).

No. 32.

APPLICATION OF THE FOREIGNERS ACT, 1864 TO A SUBJECT OF A NATIVE STATE.

(19th October, 1914.)

Home Department Political A. Proceedings, October 1914, Nos. 365—369 and K. W.

(Legislative Department unofficial No. 668-A of 1914.)

If Mohammad Ali is a subject of the Nawab of Rampur and has not been naturalized as a British subject, he must be held to be an alien. For the purposes of our domestic law this point is clear enough, but I am not satisfied that the Foreigners Act was intended to apply to a case of this kind. I am not aware of what happened in the case that was the subject of reference when Mr. Carnduff noted. Even granting that the strictly technical interpretation of the law is in favour of applying the Act against Muhammad Ali, it is a grave step enough to presume that the legality of doing so will be tested in the Courts. Should it be so, I am unable to say that judicial pronouncement will not be largely influenced by the spirit of the Act rather than mere words of it. On a careful consideration of the law point involved it appears to me that, to say the least of it, there are elements of doubt that preclude the giving of a definite and certain reply to the present reference.

No. 33.

PROTECTION FROM CIVIL LITIGATION OF INDIAN SOLDIERS OUT IN THE WAR.

(24th October, 1914.)

Home Department Judicial A. Proceedings, March, 1915, Nos. 329—353.

(Legislative Department unofficial No. 670 of 1914.)

THE desire to protect the soldier that is out in the war must be shared by all of us, but the length to which the Home Department appear to be disposed to go are not free from many difficulties and pitfalls. To bar all institution of suits against soldiers, even with the inclusion of suits for the recovery of price of necessaries, will involve considerable dislocation of the civil judicial administration of the country in many parts of India. The complication presented by the joint family system will in itself create many undesirable situations. The soldier member of a joint family not infrequently leaves the protection of his rights and titles into the hands of the *karta*. To prohibit institution of a suit against a family like this because of the absence of the soldier member would hardly seem to be reasonable. In fact one can imagine cases where the postponement may work as a great hardship in the forced or, at any rate, encouraged accumulation of interest. On the other hand, the exclusion of the soldier from a suit like this would be wholly impracticable as it would touch the very fabric of the joint system resulting in many ways, in substantial laws to the absentee. There are also many other considerations that demand exceedingly cautious action in respect of a delicate matter which affects so much questions of title. I think any general prohibition by an Ordinance will be an exceedingly dangerous measure. If anything is to be done in this connection, it will be necessary to examine what are the classes of cases in which relief may be given without running up against principles of law that will not permit hasty and ill-considered interference.

No. 34.

THE RELIGIOUS BUILDINGS PROTECTION BILL.

(19th July, 1915.)

Legislative Department A. Proceedings, October, 1915, Nos. 117—121.

On the question as to whether the Bill under consideration is or is not covered by the provision of Section 19 of the Indian Councils Act, 1861, I have little doubt that it is, inasmuch as in certain circumstances the religious usages of some of His Majesty's subjects may well be affected by the proposed legislation. It is evident, therefore, that without the previous sanction of the Governor General the Bill cannot be introduced. The Raja of Mahmudabad himself seems to realise it as is clearly indicated in his letter to Secretary.[1]

2. The discretion to grant or refuse permission is vested in His Excellency the Governor General, and it is for him to decide whether the introduction prayed for by the Raja should be allowed or not.

3. As a matter of policy, touching the principles of the Bill, I may perhaps be allowed to say that should Government be opposed to them, the introduction of a Bill of the kind under consideration is likely to raise considerable religious feeling and will as such be very undesirable at the present juncture for the supporters of the Bill, and the Government will find themselves in opposition on the exceedingly difficult ground of religion, religious rights and usages.

On the other hand, I see distinct advantage in allowing the Bill to be introduced if Government do not see any objection to the acceptance of its principles.

The Home and Revenue Departments have condemned the Bill. As far as I can understand, the condemnation is based on the ground of the impolicy of tying down the hands of the Executive Government in respect of such religious buildings and objects of religious sanctities as may have been registered under the proposed Act. It is urged that on grounds of public utility and convenience such a course is to be avoided. I am not sure how far this contention is correct. All measures of affording relief to the public are based on the consideration that they will bring happiness and contentment to it. It is a question of grave moment to the Indian public that all its religious buildings and objects of religious sanctity should be left uninterfered with. The sentiment is universal but may be accepted to be a very much living and active one among all classes of Indians. They have not yet learnt to subordinate such feelings to advantages derivable from materialistic sources alone. For if they had, India would not have, in recent years, furnished us with so many examples of disturbances of the Cawnpore mosque

[1] Sir William Vincent.

type ending in great loss of life. The question then is whether it is wise to force upon a people so imbued with religious notions the acceptance of geometrical symmetry in roads or the utility of reservoir for storage of water at the sacrifice of their places of worship or objects of religious sanctity. It may be, their adherence to these feelings is unreasonable from the point of view of material civilisation, but we, as guardians of the safety and happiness of the Indian public, are not, I venture to submit, entitled to refuse to recognise the important principle that such deeply felt sentiment and the Government of the country must ever run in accord. This can hardly be disputed. In fact the Circular issued by the Department of Revenue and Agriculture to avoid, as far as possible, the acquisition of sacred buildings and places clearly denotes the truth of the proposition. The Bill, it is true, goes further than the Circular. It secures immunity from acquisition to all buildings and places that are registered by the Collector after a due and proper enquiry. There seems to be very little doubt that the feeling of the country, so far as one can judge from past events, is with the principles of this Bill. The present is a supreme moment in India and Indian history, and in my opinion the Government stands to gain far more by a generous recognition of the sentiments of the people on this point than in standing out on a principle which may secure freedom of choice and unrestricted acquisition but at the risk of alienating the sympathy of the people.

4. For the reasons set forth above, it is submitted that the question of granting or withholding the permission to introduce the Bill is largely influenced by the view that may be taken of the policy underlying its provisions.

G. M. Press, Simla.—No. C.41L.D.—20-6-22.—50—M.D., etc.

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TO

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